CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 47

SARAH ENELOW, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 17, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC)., PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1934.

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Docket Entries.

Sept. 7, 1933, Exemplification of Record from Court of Common Pleas for Allegheny County filed.

Oct. 7, 1933, Affidavit of Defense filed.

Oct. 7, 1933, On motion of defendant, order entered permitting defendant to pay into the registry of this Court the sum of $587.17.

Oct. 24, 1933, Reply to New Matter filed.

Nov. 22, 1933, Praecipe for issue filed.

Dec. 15, 1933, On petition of defendant, order entered granting rule on plaintiff to show cause why hearing in equity should not be granted; rule returnable Dec. 23, 1933.

Dec. 22, 1933, Answer of plaintiff to petition of defendant for hearing in equity filed.

Dec. 28, 1933, Hearing before McVicar, J.

Jan. 2, 1934, Order of Court filed making rule absolute, plaintiff excepts, exception noted and Bill sealed.

Jan. 16, 1934, On petition of plaintiff, order entered allowing appeal, and directing that appeal bond for costs, and *supersedeas* in sum of $500 be given.

Jan. 16, 1934, Assignment of error filed.

Jan. 16, 1934, Appeal bond approved by Court and filed.

Jan. 16, 1934, Acceptance of service filed.

Jan. 17, 1934, Citation issued returnable Feb. 16, 1934.

Jan. 17, 1934, Praecipe for record on appeal with acceptance of service thereon filed.

Record at No. 415 October Term, 1933, removed from the Court of Common Pleas, in and for the County of Allegheny, Pennsylvania.

(Filed Sept. 7, 1933.)

Appearance Docket Entry.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

SARAH ENELOW, vs. NEW YORK LIFE INSURANCE COMPANY, a Corporation.	No. 415 October Term, 1933.

July 11, 1933, Summons In Assumpsit to first Monday of August 1933.

July 18, 1933, Writ returned showing service accepted for defendant Company by Insurance Commissioner of Pennsylvania on July 12, 1933.

July 31, 1933, Plaintiff's statement and Affidavit filed with service accepted July 31, 1933 by Attorneys for Defendant.

August 9, 1933, Petition presented in open Court and on motion, Bond for removal of above case to

District Court of the United States presented in open Court and said bond of defendant with Fidelity and Casualty Company of New York as surety in the sum of Five Hundred ($500.00) Dollars presented in open Court approved and filed.

Eo die, And it is ordered that this cause be removed to said District Court of the United States for the Western District of Pennsylvania pursuant to the statute of the United States of America, and that all other proceedings in this Court in this cause be stayed.

Praecipe for Summons in Assumpsit.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

SARAH ENELOW, vs. NEW YORK LIFE INSURANCE COMPANY, a corporation organized and existing by and under the laws of the State of New York.	No. 415 October Term, 1933.

JOHN VOGT, ESQ.,
Prothonotary.

Issue summons in assumpsit in above entitled case, returnable the first Monday of August, 1933.

SACHS & CAPLAN,
Attorneys for Plaintiff.

Filed and Issued July 11th, 1933.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

RETURN RECEIPT.

Received from the Postmaster the Registered or insured article, the original number of which appears on the face of this card.

Ins. Dept.
J. L. Paris
Date of Delivery, July 12th, 1933.

ON REVERSE SIDE OF CARD.

Matthews,
Post Office Department
Official Business
Registered Article
No. 478912
Insured Parcel
No. .....

Return to Frank I. Gollmar, Sheriff.
Street and Number
or Post Office Box, Allegheny County,
Pittsburgh, Pennsylvania.

Receipt for Registered Article No. 478912 Attached.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

THE COMMISSIONER

COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
Harrisburg

Registered Letter

July 12, 1933.

Frank I. Gollmar, Sheriff,
Pittsburgh, Pa.

Dear Sir:

I am in receipt of yours of the 11th inst. and am returning herewith original Summons in Assumpsit in the case of

Sarah Enelow
vs.
New York Life Ins. Co.

Upon which I have duly noted acceptance of service. A receipt for the $2.00 fee is also inclosed.

Very Truly yours,

C. F. ARMSTRONG
C. F. ARMSTRONG,
Insurance Commissioner.

The Commonwealth of Pennsylvania,
Allegheny County. } ss.:

To the Sheriff of said County, Greeting:

We command you that you summon New York Life Insurance Company, a corporation organized and

existing by and under the Laws of the State of New York so that it be and appear before our Court of Common Pleas No. , to be holden at the City of Pittsburgh, in and for said County, on the first Monday of August next, there to answer Sarah Enelow of a Plea of Assumpsit, And have you then and there this Writ.

WITNESS the Hon. James R. Macfarlane, President Judge of our said Court, the 11th day of July A. D. one thousand nine hundred and thirty-three.

JOHN VOGT,
(SEAL) *Prothonotary.*

Plaintiff's Statement.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

SARAH ENELOW, vs. NEW YORK LIFE INSURANCE COMPANY, a Corporation.	No. 415 October Term, 1933.

The plaintiff sues to recover from the defendant the sum of five thousand ($5,000) dollars, with interest thereon from June 10th, 1933, upon the following cause of action, to wit:

1. Sarah Enelow, the plaintiff herein, is a resident of the City of Pittsburgh, County of Allegheny and State of Pennsylvania.

2. New York Life Insurance Company, the defendant, is a corporation duly incorporated and doing

business in the City of Pittsburgh, County of Allegheny and State of Pennsylvania and having its home office in the City and State of New York.

3. This is an action upon a written contract.

4. On December 30th, 1931, the defendant, upon the considerations therein set forth, issued its written contract of insurance, numbered 11,680,798, to Max Enelow, the husband of the plaintiff, therein named as the insured, and therein and thereby agreed to pay the sum of five thousand ($5000) dollars to the plaintiff upon receipt of due proof of the death of the said Max Enelow, the insured.

5. A true and correct copy of said policy of insurance is annexed hereto and made part hereof, marked Exhibit "A".

Plaintiff avers that the application referred to in the policy is no part of the contract. Plaintiff further avers that at the time the said policy was issued, there was in full force and effect an Act of Assembly of the Commonwealth of Pennsylvania, approved May 17, 1921, P. L. 682, commonly known as the Insurance Company Law of 1921; that art. IV, section 410, of the said Act of Assembly (40 PS 510), provides as follows:

> "No policy of life . . . . insurance . . . . shall be issued . . . . unless it contains in substance the following provisions:
>
> (d) A provision that the policy shall constitute the entire contract between the parties, but if the company desires to make the application a

part of the contract, it may do so, provided a copy of said application shall be endorsed upon or attached to the policy when issued, and in such case the policy shall contain a provision that the policy and the application therefor shall constitute the entire contract between the parties.

that art. VI, section 616, of said Act of Assembly (40 PS 751), provides as follows:

"No policy of insurance against loss from sickness, or loss or damage from bodily injury or death of the insured by accident, shall be issued or delivered by any stock or mutual casualty company, or any stock or mutual life insurance company issuing such policies, to any person in this Commonwealth until a copy of the form thereof, and of the classification of risks and the premium rates pertaining thereto, have been filed with the Insurance Commissioner; . . ."

that art. VI, section 617, of said Act of Assembly (40 PS 752), provides as follows:

"No such policy (as enumerated in section 616), shall be issued or delivered except subject to the following conditions; . . . . nor (d) unless every printed portion thereof and of any endorsements or attached papers shall be plainly printed in type of which the face shall be not smaller than ten point; . . . ."

That the said policy was issued under the authority of the said statute, the provisions of which are binding upon and enforceable against the defendant, the policy containing provisions for insurance against loss from sickness, and/or loss and damage from bodily injury

or death of the insured by accident. That the defendant failed to comply with the above cited provisions of said statute, in that it did not endorse upon or attach to the said policy when issued a legible or readable copy of the said application; that the defendant, in bad faith and in violation of said statute, and to defeat the purpose thereof, and to make it difficult or impossible to read the questions, answers and printed matter contained in the said application, attached to the said policy an alleged photostat of the said application, which was microscopic in character, blurred and illegible; that the printed portion of said alleged photostat of said application was not plainly printed in type of which the face was not smaller than ten point, as required by said statute, but, on the contrary, the face of said type, as reduced in said alleged photostat, was less than 5½ point; that the photostat paper attached to the policy is not such a copy of the application as is contemplated by the Act of Assembly, and, therefore, under said statute, the application referred to in the policy is no part of the said contract of insurance.

6. The stipulated premiums were duly paid upon the said policy by the said Max Enelow, who also performed all things required by him thereunder.

7. The said Max Enelow died on May 27, 1933.

8. Proofs of the death of the said Max Enelow, upon the blanks provided by the defendant, were furnished to said defendant on or about June 10th, 1933.

9. On, to wit, July 10, 1933, the defendant refused to pay the sum due under said policy.

10. The plaintiff claims five thousand ($5,000) dollars with interest as aforesaid, which she avers is justly due and payable by defendant.

Jury trial demanded.

SACHS & CAPLAN,
Attorneys for Plaintiff.

State of Pennsylvania, }
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared Sarah Enelow, plaintiff above named, who being by me duly sworn, deposes and says the facts set forth in the foregoing statement are true and correct.

SARAH ENELOW.

Sworn to and subscribed this 12th day of July, 1933.

M. M. DEMOND,
(SEAL) *Notary Public.*
My commission expires February 21, 1935.

To the within Defendant:

You are required to file an Affidavit of Defense to this Statement of Claim, within fifteen days from the service hereof.

SACHS & CAPLAN,
Attorneys for Plaintiff.

Service of the within Plaintiff's Statement accepted this 31st day of July, 1933.

SMITH, BUCHANAN, SCOTT AND GORDON,
Attorneys for Defendant.

Filed July 31, 1933.

NEW YORK LIFE INSURANCE COMPANY

A MUTUAL COMPANY

AGREES TO PAY

to Sarah, wife of the insured * * * (with right on the part of the Insured to change the Beneficiary in the manner provided herein) * * * Beneficiary (the face of this policy) * * * Five Thousand * * * Dollars upon receipt of due proof of the death of * * * Max Enelow * * * the Insured, or (double the face of this policy) * * * Ten Thousand * * * Dollars if such death resulted from accident as defined under "Double Indemnity" and subject to the provisions therein set forth.

And upon receipt of due proof that the Insured is totally and presumably permanently disabled before age 60, THE COMPANY AGREES TO PAY TO THE INSURED * * * Fifty * * * Dollars each month and to waive payment of premiums, as provided under "Total and Permanent Disability."

This contract is made in consideration of the application therefor and of the payment in advance of the sum of $184.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Thirtieth day of June Nineteen Hundred and Thirty-two, and of a like sum on said date and every Six calendar months thereafter during the life of the Insured.

(The above premium includes $2.60 for the Double Indemnity Benefit and $24.05 for the Disability Benefits.)

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the Thirtieth day of December Nineteen Hundred and Thirty-one, which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Thirtieth day of December Nineteen Hundred and Thirty-one.

THOMAS A. BUCKNER,
President.

FREDERICK M. JOHNSON,
Secretary.

WM. CHAPMAN,
Registrar.

Age 55
Examined VD

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Disability Benefits. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

* * * *

The Contract.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of the Policy will be required in any settlement thereof.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premuim and except as to provisions and conditions relating to Disability and Double Indemnity Benefits.

Praecipe for Appearance.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

SARAH ENELOW,
vs.
NEW YORK LIFE INSURANCE COMPANY, a corporation.
No. 415 October Term, 1933.

To JOHN VOGT, ESQ., *Prothonotary.*

Sir:

Kindly enter our appearance for the defendant in the above entitled case.

SMITH, BUCHANAN, SCOTT AND GORDON,
Attorneys for Defendant.

August 5, 1933.
Filed August 5, 1933.

Petition for Removal to United States Court.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA.

vs.
NEW YORK LIFE INSURANCE COMPANY.
No. 415 October Term, 1933.

To the Honorable, the Judges of the said Court:

The petition of the New York Life Insurance Company, the defendant in the above entitled action, respectfully represents:

1. The matter in controversy in this cause exceeds, exclusive of interest and costs, the sum or value of $3,000.

2. This petition is presented at the time or before the time the defendant is required by the laws of the Commonwealth of Pennsylvania, or by the rules of this Court, to answer or plead to the plaintiff's statement of claim.

3. This is a suit of a civil nature between Sarah Enelow, as plaintiff, who at the commencement of this suit was and still is a citizen of the Commonwealth of Pennsylvania, residing in the western district thereof, and the New York Life Insurance Company, as defendant, a corporation duly incorporated under the laws of the State of New York, having its principal office in the City of New York in said State, and which was at the time of the institution of this suit and still is a citizen of said last named State.

4. Your petitioner has made and herewith files a bond with good and sufficient surety for its entering in the District Court of the United States for the Western District of Pennsylvania within thirty days from the date of filing this petition a certified copy of the record in this suit and for paying all costs that may be awarded by the said District Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

5. Written notice of the defendant's intention to present and file this petition and bond for removal has been given the plaintiff by the defendant.

WHEREFORE your petitioner prays your Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said District Court of the United States for the Western District of Pennsylvania.

NEW YORK LIFE INSURANCE COMPANY,
By WALKER BUCKNER.

State of New York,
County of New York. } ss.:

Before me, the undersigned authority, personally appeared WALKER BUCKNER, who, being by me first duly sworn according to law, deposes and says that he is Vice President of the New York Life Insurance Company, and its duly authorized agent in this behalf; and that the averments of fact contained in the foregoing petition are true and correct to the best of his knowledge, information and belief.

WALKER BUCKNER.

Sworn to and subscribed before me this 19th day of July, 1933.

ANNE J. CONNELLY,
(N. P. SEAL) *Notary Public.*

ANNE J. CONNELLY,
Notary Public, Kings County.
Kings County Clerk's No. 126.
Kings County Register's No. 4122.
Certificate filed New York County No. 216.
New York County Register's No. 4C115.
My commission expires March 30th, 1934.

REMOVAL BOND

KNOW ALL MEN BY THESE PRESENTS that the NEW YORK LIFE INSURANCE COMPANY, as principal, and the FIDELITY AND CASUALTY COMPANY OF NEW YORK, as surety, are held and firmly bound unto SARAH ENELOW in the penal sum of five hundred dollars ($500.00) to the payment whereof well and truly to be made unto the said Sarah Enelow, her representatives and assigns, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

WHEREAS the New York Life Insurance Company is about to or has filed its petition in the Court of Common Pleas of Allegheny County, Pennsylvania, asking for the removal to the District Court of the United States for the Western District of Pennsylvania of the above entitled cause, wherein Sarah Enelow is plaintiff and the New York Life Insurance Company defendant.

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that, if the New York Life Insurance Company shall enter in said District Court of the United States for the Western District of Pennsylvania within thirty days from the date of filing said petition a certified copy of the record in said suit, and well and truly pay all costs that may be awarded by said District Court of the United States if said court shall hold that said suit was improperly removed thereto, and shall do and perform all acts required by the laws of the United States to be done by it in removal of said suit, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof the New York Life Insurance Company, as principal, and Fidelity and Casualty Company of New York, as surety, have caused this bond to be duly executed by their proper officers and their respective corporate seals to be attached this 5th day of August, 1933.

New York Life Insurance Company,
By Walker Buckner,
(corp. seal) *Vice President.*

Fidelity and Casualty Company of New York
By Margaret E. McFadden,
(corp. seal) *Attorney.*

Attest:
Frederick M. Johnson,
Secretary.

Attest:
Walter I. Sickles,
Attorney.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

The Pioneer Bonding Company of the United States
Bonding Department: Hale Anderson,
Vice-President, in charge
New York, N. Y.

Know All Men by these Presents:

That The Fidelity and Casualty Company of New York has made, constituted, and appointed, and by these presents does make, constitute, and appoint Margaret E. McFadden, of Pittsburgh, Pennsylvania, its

true and lawful attorney for it and in its name, place, and stead to execute on behalf of the said Company, as surety, bonds, undertakings, and contracts of suretyship to be given to all obligees provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of twenty five thousand dollars.

IN WITNESS WHEREOF The Fidelity and Casualty Company of New York has caused its official seal to be hereunto affixed, and these presents to be signed by one of its assistant secretaries and attested by one of its assistant secretaries this 15th day of March, 1933.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

By WM. P. HARVEY

(SEAL) *Assistant Secretary.*

Attest:

FRANK B. SMEDES,

Assistant Secretary.

State of New York,
County of New York. } ss.:

FRANK B. SMEDES, being duly sworn, deposes and says:

That he is an assistant secretary of The Fidelity and Casualty Company of New York, the corporation which is described in and which executed the instrument overleaf; that he knows the corporate seal of the said corporation; that the seal affixed to the instrument overleaf is the corporate seal of The Fidelity and Casualty Company of New York, and was thereto af-

fixed by order and authority of the board of directors of the said Company; that he signed his name thereto by like order and authority; that he is acquainted with Wm. P. Harvey, and knows him to be an assistant secretary of the said Company; that the signature of the said Wm. P. Harvey subscribed to the said instrument is in the genuine handwriting of the said Wm. P. Harvey, and was thereto subscribed by order and authority of the said board of directors of the said Company; that the said Company is duly and legally incorporated under the laws of the State of New York, and has complied with and is now complying with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds.

The deponent further states that the following is a true copy of an extract from the minutes of a meeting of the board of directors of the said Company held at its office in the City of New York on the 15th day of March, 1933, a quorum being present, and the resolutions contained in the said extract were unanimously adopted and are now in full force and effect:

> "RESOLVED, That ERNEST STURM, chairman of the board of directors of the Company, be, and that he hereby is; that BERNARD M. CULVER, president of the Company, be, and that he hereby is; and that HALE ANDERSON, a vice-president of the Company, be, and that he hereby is, authorized to execute powers of attorney qualifying the attorney named in the given power of attorney to execute in behalf of The Fidelity and Casualty

Company of New York bonds, undertakings, and all contracts of suretyship; and that any vice-president, or any assistant secretary be, and that each of them hereby is, authorized to attest the execution of any such power of attorney, and to attach thereto the seal of the Company."

"RESOLVED, That either ALBERT BRUNS or WILLIAM P. HARVEY, each an assistant secretary of the Company, be, and that he hereby is, authorized to execute alone powers of attorney qualifying the attorney named in the given power of attorney to execute in behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and all contracts of suretyship, not exceeding one hundred thousand dollars in amount; and that any vice-president, or any assistant secretary be, and that each of them hereby is, authorized to attest the execution of any such power of attorney, and to attach thereto the seal of the Company."

FRANK B. SMEDES,
Assistant Secretary.

Sworn to before me this 27th day of July, 1933.

FLORENCE CARROLL,
(SEAL) *Commissioner of Deeds,*
City of New York.

Commission expires May 10, 1934.

I, HAZEL MACPHAIL, an attorney of The Fidelity and Casualty Company of New York, do hereby certify that I have compared the copy of the power of attor-

ney overleaf and the foregoing copy of the affidavit annexed to the said power of attorney with the originals now on file in the home office of the said Company, and that the same are correct transcripts therefrom and of the whole of the said originals, and that the said power of attorney has not been revoked and is now in full force and effect.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Company this fifth day of June, in the year of one thousand nine hundred and thirty-three.

HAZEL MACPHAIL,

(SEAL) *Attorney.*

Order of Court.

Now, to-wit, Aug. 9, 1933, the defendant in the above entitled case having given written notice to the plaintiff of its intention to present and file in this Court a petition and bond for the removal of this cause to the District Court of the United States for the Western District of Pennsylvania, and having within the time provided by law presented and filed its petition for removal of this cause to the District Court of the United States for the Western District of Pennsylvania, and having at the same time offered its bond in the sum of five hundred dollars ($500.00), with good and sufficient surety, pursuant to statute and conditioned according to law, NOW, THEREFORE, this Court does hereby accept and approve said bond and hereby orders that this cause be removed to said District Court of the United States for the Western District of

Pennsylvania pursuant to the statute of the United States of America, and that all other proceedings in this Court in this cause be stayed.

BY THE COURT,

E.

Notice.

To Sarah Enelow, Plaintiff:

YOU ARE HEREBY NOTIFIED that the defendant, New York Life Insurance Company, intends to file in the Court of Common Pleas of Allegheny County, Pennsylvania, a petition and bond for the removal of the above entitled cause to the District Court of the United States for the Western District of Pennsylvania on August 9th, 1933, at 8:30 o'clock A. M. Eastern Standard time, or as soon thereafter as the attention of the Court may be had.

NEW YORK LIFE INSURANCE COMPANY,
By SMITH, BUCHANAN, SCOTT & GORDON,
Its Attorneys.

Acceptance of Service.

Service of the foregoing notice is hereby accepted this 7th day of August, 1933.

SACHS & CAPLAN,
Attorneys for Plaintiff.

Filed August 9th, 1933.

Commonwealth of Pennsylvania, }
Allegheny County. } ss.:

I, JOHN VOGT, Prothonotary of the Court of Common Pleas, in and for said County, certify that the foregoing is a full and correct copy of the whole record for removal of the case therein stated, wherein Sarah Enelow, plaintiff, and New York Life Insurance Company, a corporation, defendant, as the same remains of record before the said Court, at No. 415 of October Term, A. D. 1933 C.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of the said Court, the Ninth day of August A. D. 1933.

JOHN VOGT,
Prothonotary.

(SEAL)

Allegheny County, ss.:

I, JAMES R. MACFARLANE, President Judge of the Court of Common Pleas, in and for said County, Certify that JOHN VOGT, by whom the above attestation was made, was, at the date thereof, Prothonotary of said Court, duly qualified; and the said attestation is in due form of law, and made by the proper officer.

WITNESS my hand and seal, the Ninth day of August A. D. 1933.

JAMES R. MACFARLANE (SEAL)

Allegheny County, ss.:

I, JOHN VOGT, Prothonotary of the Court of Common Pleas, for said County, certify that Hon. James

R. Macfarlane, Esq., by whom the above certificate was given, and whose name is thereby subscribed in his own proper handwriting, was at the date thereof, President Judge of the said Court, duly commissioned and sworn and acting.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, the Ninth day of August, 1933.

JOHN VOGT,
Prothonotary.

(SEAL)

Affidavit of Defense.

(Filed Oct. 7, 1933.)

State of New York,
County of New York. } ss.:

Before me, the undersigned authority, personally appeared WILBUR H. PIERSON, who, being by me first duly sworn according to law, deposes and says that he is Second Vice President of the New York Life Insurance Company, the defendant in the above entitled case, and duly authorized to make this affidavit in its behalf; that in so far as the allegations herein contained are made of his own knowledge, they are true and correct, and in so far as they are made upon information received from others, he is reliably informed and verily believes them to be true and expects to be able to prove them at the trial of this case; and that the defendant has a full, just and legal defense to the whole of the plaintiff's claim, except as hereinafter stated, the nature and character of which defense is as follows:

1. The allegations of fact contained in the first paragraph of the plaintiff's statement of claim are admitted.

2. The allegations of fact contained in the second paragraph of the plaintiff's statement of claim are admitted.

3. The allegation of fact contained in the third paragraph of the plaintiff's statement of claim is admitted.

4. The allegations of fact contained in the fourth paragraph of the plaintiff's statement of claim are admitted.

5. The averments of the fifth paragraph of the statement of claim are denied. It is specifically denied that Exhibit "A" attached to the statement of claim is a true and correct copy of the policy of insurance involved in this suit. A true and correct copy of the application is attached to the policy but is omitted from the copy of the policy attached to the statement of claim. It is specifically denied that the application referred to in the policy is no part of the contract. The averments regarding the law of Pennsylvania are immaterial and require no answer. It is specifically denied that the defendant failed to comply with any applicable provisions of any statute or law, or that the defendant did not endorse upon or attach to the said policy when issued a legible or readable copy of the application, or that the defendant in bad faith or in violation of any statute or to defeat the purpose thereof or to make it difficult or impossible to

read the questions, answers and printed matter contained in the said application, attached to the said policy a photostat of the application which was microscopic in character, blurred and illegible, or that the printed portion of said photostat of said application was not plainly printed. The copy of the application attached to the policy is a true and correct photostatic copy of said application, is legible and readable, a facsimile and exact reproduction of said application and was attached to the policy in good faith. It is denied that the photostat paper attached to the policy is not such a copy of the application as is contemplated by the applicable Act of Assembly or that under any statute the application referred to in the policy is no part of the purported contract of insurance. The copy of the application attached to the policy is such a copy as is contemplated by the applicable law and is part of the purported contract of insurance. A true and correct copy of said application, both Parts I and II, is attached hereto as Exhibit No. 1 and made a part hereof.

6. It is admitted that the premiums were duly paid upon said policy, but if anything more than this is intended by the general and ambiguous last clause of paragraph 6 of the statement of claim, the same is denied.

7. The allegation of fact contained in the seventh paragraph of the plaintiff's statement of claim is admitted.

8. The allegations of fact contained in the eighth paragraph of the plaintiff's statement of claim are admitted.

9. It is admitted that the defendant on July 10, 1933, refused to pay the face amount of said policy, but it is denied that that sum was due under the policy.

10. It is specifically denied that the sum of $5,000 is justly due and payable by the defendant to the plaintiff.

NEW MATTER

11. As a prerequisite to the issuance by the defendant of the aforesaid policy, Max Enelow, on December 16, 1931, made and signed an application to the defendant for such insurance. As a part of said application, said Max Enelow, on December 18, 1931, made answers to the defendant's medical examiner to questions contained in Part II of the application and signed said Part II of the application. A true and correct copy of said application, both Parts I and II, is attached to and made part of said policy. The answers appearing in said application to the questions contained therein are the correctly recorded answers made to the respective questions by said Max Enelow. Included in the questions propounded to and answers made by said Max Enelow are the following:

"7. B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium? No

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

A. The Brain or Nervous System? No

B. The Heart, Blood Vessels or Lungs? No

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers? No

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years? None"

In his answers to the questions prior to No. 10, said Max Enelow named no physician nor any ailment or disease whatsoever.

12. Also in said application, Max Enelow stated: "On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them."

13. In fact, the aforesaid answers of Max Enelow to questions in Part II of the application were false. Said Max Enelow had before December 18, 1931, been under observation or treatment in a hospital, had consulted a physician or practitioner for and had suffered from an ailment or disease of his nervous system, heart and blood vessels, had consulted physicians and practitioners for ailments and diseases not included in any of his answers, and within the five years immediately preceding December 18, 1931, had consulted and been examined and treated by various physicians and practitioners. In or about December,

1928, said Max Enelow was in the Mercy Hospital in Pittsburgh for observation, treatment and tests. From July 6, 1930, until July 25, 1930, said Max Enelow was in the Montefiore Hospital of Pittsburgh for observation. In September, 1928, and again from November 26, 1928, until December 5, 1928, said Max Enelow consulted and was examined by Dr. Milton Goldsmith. From December 6, 1928, until December 14, 1928, said Max Enelow consulted and was examined by Dr. Clement R. Jones. On February 17, 1930, said Max Enelow consulted and was examined by Dr. Milton Goldsmith. During the months of July, August and September, 1930, said Max Enelow consulted and was examined and treated by Dr. Leo H. Criep. At various times during the year 1931, said Max Enelow consulted and was examined and treated by Dr. W. A. Clark. All of the doctors named in this paragraph are physicians or practitioners. Said consultations with and examinations and treatments by physicians were for neurosis, an ailment of the nervous system, and cardiac disease, an ailment of the heart and blood vessels, and said Max Enelow was suffering from those ailments at the time of the aforesaid consultations with and examinations and treatments by physicians, and said ailments were also the cause of his death.

14. The aforesaid questions and answers were material to the risk assumed by the defendant when it issued said policy of insurance, and, if said questions had been answered truthfully, the defendant would not have issued said policy. The defendant in approving said Max Enelow's application and issuing the aforesaid policy believed the above quoted answers of said

Max Enelow to be full, complete and true, and relied and acted upon them.

15. Said answers were made by Max Enelow with knowledge of their falsity and fraudulently for the purpose of procuring said insurance.

16. The defendant did not know or have any reason to learn of said fraudulent misrepresentations by which said policy was procured from it until about July 10, 1933, whereupon it promptly on said date elected to avoid and rescind said policy on account of said fraudulent misrepresentations and so notified the plaintiff and tendered to her a return of all premiums received on account of said policy, with interest from the time of receipt to the date of said tender, amounting in all to $587.17, and at the same time offered to do whatever else, if anything, it ought to do for the purpose of such rescission. Said tender was refused by the plaintiff. The defendant has always since July 10, 1933, been ready and willing and is now ready and willing to refund all of said premiums, together with interest thereon, and simultaneously with the filing of this affidavit of defense will pay into this Court said sum of $587.17, and hereby offers to do whatever else, if anything, it ought in equity to do for the purpose of cancelling said policy and restoring the *status quo*.

17. The defendant hereby tenders judgment in the sum of $587.17, being the amount of premiums received by it upon the aforesaid policy, with interest thereon from the date of receipt to the date of the aforesaid tender.

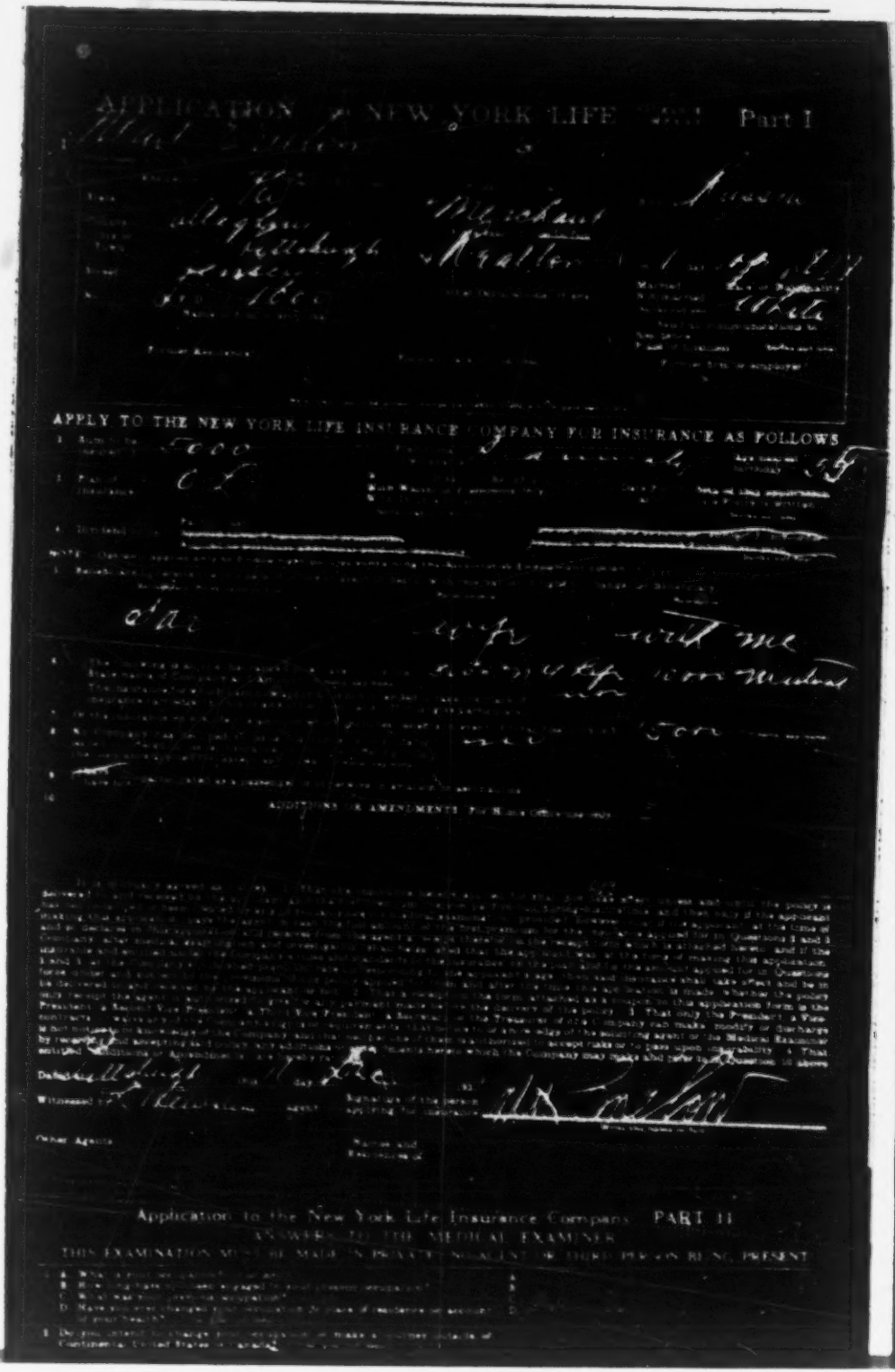
18. By way of equitable relief, the defendant hereby respectfully prays that the aforesaid policy of insurance be surrendered, cancelled and rescinded.

WHEREFORE it is denied that the defendant is indebted to the plaintiff in the sum of $5,000, with interest thereon from June 10, 1933, or in any other sum or sums whatsoever, except the sum of $587.17, for which judgment is herein tendered and which will be paid into the Registry of this Court simultaneously with the filing of this affidavit of defense.

WILBUR H. PIERSON.

Sworn to and subscribed before me this 6th day of October, 1933.

GEORGE J. WIRTENSON, JR.,
(SEAL) *Notary Public, Queens County.*
Queens County Clerk's No. 3301
Queens County Register's No. 3457
Certificates filed in New York County
New York County Clerk's No. 724
New York County Register's No. 4W446
My commission expires March 30, 1934.



APPLICATION NEW YORK LIFE Part I

APPLY TO THE NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS

Application to the New York Life Insurance Company PART II

ANSWERS TO THE MEDICAL EXAMINER

and an advance on the application and receive from the agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance on the plan and for the amount applied for in Questions 3 and 3 at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 3. That a receipt on the form attached as a coupon to this application form is the only receipt the agent is authorized to give for any payment made before the delivery of the policy. 4. That only the President, a Vice-President, a Second Vice President, a Third Vice President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements, that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability. 5. That by receiving and accepting said policy any additions or modifications hereto which the Company may make and put in the application in above entitled, additions or Amendments are hereby ratified.

Dated at [illegible] this [illegible] day of [illegible] 19[illegible]

Witnessed by [illegible] Agent

Signature of the person applying for insurance [illegible]

(Give the name in full)

Other Agents

Names and Residences of

Application to the New York Life Insurance Company PART II

ANSWERS TO THE MEDICAL EXAMINER

THIS EXAMINATION MUST BE MADE IN PRIVATE. NO AGENT OR THIRD PERSON BEING PRESENT

1 A What is your occupation? (If self-employed, state whether in business, profession or farming)
B How long have you been engaged in your present occupation?
C What was your previous occupation?
D Have you ever changed your occupation or place of residence on account of your health? (If so, give full details)

2 Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so, give full details)

3 A How many aerial flights have you taken and when last?
B State whether as passenger or pilot and whether you are a Reservist
C Do you contemplate participation in aeronautics? (If so, state what you intend to do and how often)

4 In what States have you lived the last ten years and which years in each? (If outside of U.S. state countries and which years in each?)

5 A How frequently if at all and in what quantity do you drink beer, wine, sparkling or other intoxicants?
B Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance?
C Have you ever been declined for life insurance or for the reinstatement of life insurance?
D Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?

6 A Have you now pending any other application for insurance on your life or for the reinstatement of insurance?

7 A Have you ever had any accident or injury or undergone any surgical operation? (If so, give full details and benefits received)
B Have you ever been under observation or treatment in any hospital, asylum or sanitarium?
C Has albumin or sugar ever been found in your urine?
D Have you ever been found to have a high blood pressure?
E Have you ever raised or spat blood?
F Have you gained or lost in weight in the last year? Gain? Loss? Cause?

8 Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of
A The Brain or Nervous System?
B The Heart, Blood Vessels or Lungs?
C The Stomach or Intestines, Liver, Kidneys or Bladder?
D The Bones, Muscles, Joints or Eyes?
9 Have you ever had Rheumatism, Gout or Syphilis?
10 Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?
11 What physicians or practitioners have you consulted within the last five years? (Name and Address / Date / Reasons for Consultation, Examination or Treatment and Result)

12 Family History: (Age, if living / Age at Death / Cause of Death)
Father
Mother
Brothers
Sisters

13 A Is any person in your immediate household now ill or under medical treatment?
B Has any person in your immediate household suffered from or died of tuberculosis within the past year?

NOTICE TO MEDICAL EXAMINER: Use only black ink. The answers are to be given in full. This examination is to be conducted

DO NOT USE DASHES OR DITTO MARKS IN ANSWERING QUESTIONS

I hereby certify that the above answers were made by the applicant in my presence and were correctly recorded by me as made. I believe that the applicant is a proper person to be insured and that the statements made herein are true. I have not [illegible] the applicant to make any statements other than those recorded herein, nor have I withheld any information which has been communicated to me.

Date

Medical Examiner

Reply to New Matter.

(Filed Oct. 24, 1933.)

Allegheny County, ss:

Before me, the undersigned authority, personally appeared SARAH ENELOW, plaintiff in the above entitled cause, who being by me duly sworn deposes and says, in answer to New Matter, as follows:

1. The averments contained in paragraph 11 of the Affidavit of Defense are denied as stated. Plaintiff denies that as part of the application, her husband, Max Enelow, made the answers appearing to questions 7 (b), 8, 10 and 11, as the said alleged answers are set out in said paragraph 11. Defendant denies that said answers are the correctly recorded answers made to the said questions by the defendant, and denies that the said Max Enelow gave any of said answers to such questions. Plaintiff denies that defendant's medical examiner propounded to said Max Enelow any of the questions referred to in said paragraph 11. For further answer, plaintiff says that the alleged application is no part of the contract for the reasons set out in paragraph numbered 5 of the Statement of Claim.

2. The averments contained in paragraph 13 of the Affidavit of Defense are denied as stated. Plaintiff denies that the answers given by Max Enelow to the questions put to him by the defendant's medical examiner were false. Plaintiff denies that the said Max Enelow had, before December 18, 1931, been under observation or treatment in the hospital, had consulted a physician or practitioner for, and had

suffered from, an ailment of his nervous system, heart and blood vessels, or had consulted physicians and practitioners for ailments or diseases not included in his answers and within 5 years immediately preceding December 18, 1931, had been consulted and examined and treated by various physicians and practitioners, with the following exceptions: The said Max Enelow was in the Mercy Hospital for several days for a rest after having had his teeth extracted and he was in the Montefiore Hospital for observation. It is true he consulted Dr. Milton Goldsmith, Dr. Clement R. Jones, Dr. W. A. Clark and Dr. Leo H. Criep, but said consultations were for slight or temporary ailments such as constipation and temporary indigestion, and for no other causes. Plaintiff denies that said Max Enelow was suffering at the times stated in the Affidavit of Defense from neurosis or cardiac disease.

3. In answer to paragraph 14 of the Affidavit of Defense, plaintiff denies that the defendant, in approving Max Enelow's application and issuing the policy involved in this suit, relied and acted upon any false answers given by the said Max Enelow, and denies that he gave any false answers, and denies that the defendant, in approving said application and issuing said policy, believed the quoted alleged answers to be full, complete and true, and relied and acted upon the same.

4. Plaintiff denies that said Max Enelow gave any false answers, with knowledge of their falsity, and fraudulently, for the purpose of procuring said insurance.

5. In answer to the averments contained in paragraph 16 of the Affidavit of Defense, plaintiff denies that the said Max Enelow made any fraudulent misrepresentations to the defendant, or that the policy was procured by any fraudulent misrepresentations.

SARAH ENELOW.

Sworn to and subscribed this 24th day of October, 1933.

M. M. DEMOND,
Notary Public.

(SEAL)

My Commission expires February 21, 1935.

Praecipe for Issue.

(Filed Nov. 22, 1933.)

J. WOOD CLARK ESQ.,
Clerk.

Put the above entitled case on the issue docket.

SACHS & CAPLAN,
Attorneys for Plaintiff.

Assumpsit

SMITH, BUCHANAN, SCOTT & GORDON.

Petition for Hearing in Equity.

(Filed Dec. 15, 1933.)

To the Honorable the Judges of said Court:

The petition of the New York Life Insurance Company respectfully represents:

1. The above entitled action is in assumpsit at law by the beneficiary upon a life insurance policy.

2. In defense to said action, the petitioner has set up in its affidavit of defense that said policy of insurance was procured from it by materially false representations by the applicant regarding his prior state of health, sojourn in hospitals, treatment by physicians and other material matters. The affidavit of defense also prays by way of equitable relief that the aforesaid policy of insurance be surrendered, cancelled and rescinded.

3. By the plaintiff's replication an issue is raised as to the fraudulent misrepresentation and concealment averred in the affidavit of defense.

4. An equitable issue is raised by the defendant's affidavit of defense and the plaintiff's reply which should be adjudicated by a chancellor according to equity procedure without a jury and preferably in advance of a jury trial at law.

WHEREFORE the defendant prays that said equitable issue be heard pursuant to Section 274 (b) of the Judicial Code (28 U. S. C. A. 398) by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues.

NEW YORK LIFE INSURANCE COMPANY
By SMITH, BUCHANAN, SCOTT & GORDON
Its Attorneys.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, personally appeared WILLIAM H. ECKERT, who, being by me first duly sworn according to law, deposes and says that he is of counsel for the petitioner in the above entitled case and duly authorized to make this affidavit in its behalf and that the averments of fact contained in the foregoing petition are true and correct.

WILLIAM H. ECKERT.

Sworn to and subscribed before me this 14th day of December, 1933.

CLARA I. HOUSTON,
(SEAL) *Notary Public.*
My commission expires January 22, 1937.

ORDER OF COURT.

Now, to-wit, December 15, 1933, the foregoing petition presented in open court and upon consideration thereof, a rule is hereby entered upon the plaintiff to show cause, if any she has, why the prayer of the foregoing petition should not be granted and a hearing before a chancellor of this Court, according to equity procedure, held for the purpose of adjudicating the equitable issue whether the policy of insurance identified in the foregoing petition should not be declared void because of misrepresentation and fraud in its procuring; returnable December 23, 1933.

BY THE COURT.

Answer of Plaintiff to Petition of Defendant for Hearing in Equity.

(Filed Dec. 22, 1933.)

And now, to wit, this 20th day of December, 1933, comes Sarah Enelow, the plaintiff, and in answer to the petition of defendant for a hearing in equity, says:

1. The defendant's defence to said action is one pleadable at law and can be made fully effective as a defence at law, and the defendant has a plain, adequate and complete remedy at law.

2. The prayer in the affidavit of defence for cancellation of said policy is wholly unnecessary, as a judgment at law for the defendant will fully end plaintiff's case.

Wherefore plaintiff prays that defendant's said petition be denied and dismissed.

SARAH ENELOW,
By SACHS & CAPLAN,
Her Attorneys.

Order of the Court.

(Filed Jan. 2, 1934.)

And now, January 2, 1934, this case came on for hearing on the petition of the defendant praying that the equitable issue referred to in said petition be heard by a Chancellor according to equity procedure in advance of a trial by a jury at law of any legal issue,

and the order of this Court made December 15, 1933, granting a rule upon plaintiff to show cause why said equitable issue should not be heard as prayed for in said petition and, after hearing and consideration thereof, the said rule is made absolute. For authority for this order see Section 274 (b) of the Judicial Code (28 U. S. C. A. 398); New York Life Insurance Co. v. Marotta *et al.*, 57 Fed. (2) 1038 (CCA 3); Order of Judge Schoonmaker of this Court in the case of Adamos v. New York Life Insurance Co., No. 7424 Law; Phillips-Morefield v. Southern State Life Insurance Co., 66 Fed. (2) 29 (CCA 5); Liberty Oil Co. v. Condon National Bank *et al.*, 260 U. S. 235; Opinion of Judge Gibson of this Court, 47 Fed. (2) 935; New York Life Ins. Co. v. Hurt, 35 Fed. (2) 92 (CCA 8); Same case 41 Fed. (2) 392 (D. C., D. K., 2nd Div.); Same case 51 Fed. (2) 936 (CCA 10); Peake v. Lincoln National Life Insurance Co., 15 Fed. (2) 303 (CCA 8), and Union Pacific R. Co. v. Syas, 246 Fed. 561 (CCA 8).

BY THE COURT.

V.

D.

At request of plaintiff, exception granted to the above order and bill sealed.

NELSON MCVICAR (SEAL)

D. J.

Petition for Appeal.

(Filed Jan. 16, 1934.)

To the Honorable, the Judges of the said Court:

The Petition of Sarah Enelow respectfully represents:

1. The above entitled suit is an action at law brought by the petitioner to recover the sum of $5,000.00 on a policy of life insurance issued by the New York Life Insurance Company, the defendant, on the life of her husband, Max Enelow, the policy having matured by reason of the death of the assured. The suit was instituted in the Court of Common Pleas of Allegheny County, State of Pennsylvania, to No. 415 October Term, 1933, and was duly removed to this Court by defendant. The defendant filed an affidavit of defense in said suit wherein it denied liability because of alleged false answers made by the assured in the application for said insurance, which answers the defendant claims were fraudulently made by the insured for the purpose of procuring said insurance. In said affidavit of defense the defendant prayed that the aforesaid policy be surrendered, cancelled and rescinded. The plaintiff filed a reply denying the alleged false representations. The defendant then filed a petition in which it claimed that an equitable issue was raised by the defendant's affidavit of defense and the plaintiff's reply, and prayed that said alleged equitable issue be heard pursuant to section 274b of the Judicial Code (28 USCA 398) by a chancellor according to equitable procedure in advance of the trial by jury at law of any purely legal issue. An answer

was filed by the plaintiff opposing the application on the ground that defendant's said defense is one pleadable at law, can be made fully effective as a defense at law, and that defendant has a plain, adequate and complete remedy at law.

The court made an order on January 2, 1934, granting defendant's said petition that the alleged equitable issue be heard by a chancellor according to equitable procedure in advance of the trial by jury.

2. Petitioner feels herself aggrieved by said order for the error assigned in the accompanying assignments of error filed herewith.

Wherefore your petitioner prays that an appeal be allowed her to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, and that for such purpose a citation issue, a transcript of the record, proceedings, papers and all else on which the said order is based, be made and duly authenticated and sent to said United States Circuit Court of Appeals for the Third Circuit, that the amount of the appeal bond be fixed to cover costs and also to act as a supersedeas, that a supersedeas be allowed and the operation of the aforesaid order be suspended, pending the appeal here prayed for, and that such other orders and process be made and issued as may cause the said error to be corrected and the said judgment to be reversed by the United States Circuit Court of Appeals for the Third Circuit.

SACHS & CAPLAN,
Attorneys for Plaintiff.

ORDER OF COURT.

Now, to wit, January 16, 1934, the foregoing petition having been presented in open court, upon consideration of the same, and it appearing to the Court that the petitioner has filed her assignments of error, it is ordered, adjudged and decreed that an appeal be allowed in the above entitled case to the United States Circuit Court of Appeals for the Third Circuit from the order entered on January 2, 1934, that a citation issue, that a transcript of the record, proceedings, papers and all else upon which said decree is based, be made and duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit, that an appeal bond for costs and supersedeas be given in the sum of $500.00, and that a supersedeas issue restraining and suspending all operation of or execution process upon said decree pending said appeal.

NELSON MCVICAR,
Judge.

Assignment of Error.

(Filed Jan. 16, 1934.)

Sarah Enelow, the plaintiff in the above entitled case, complains that in the record and proceedings in said case and in the order of court of January 2, 1934, entered therein, manifest error has occurred to the prejudice of the plaintiff, more particularly specified in the following assignment of error, upon which she relies to sustain the appeal prayed for to the United States Circuit Court of Appeals for the Third Circuit:

1. The District Court erred in entering an order of court making absolute a Rule to Show Cause granted by said Court upon the plaintiff, which Rule to Show Cause, Order of Court making said Rule absolute, and plaintiff's exception thereto, are as follows:

"ORDER OF COURT

Now, to-wit, December 15, 1933, the foregoing petition presented in open court and upon consideration thereof, a rule is hereby entered upon the plaintiff to show cause, if any she has, why the prayer of the foregoing petition should not be granted and a hearing before a chancellor of this Court, according to equity procedure, held for the purpose of adjudicating the equitable issue whether the policy of insurance identified in the foregoing petition should not be declared void because of misrepresentation and fraud in its procuring; returnable December 23, 1933.

Per Curiam

V"

"ORDER OF THE COURT

And now, January 2, 1934, this case came on for hearing on the petition of the defendant praying that the equitable issue referred to in said petition be heard by a Chancellor according to equity procedure in advance of a trial by a jury at law of any legal issue, and the order of this Court made December 15, 1933, granting a rule upon plaintiff to show cause why said equitable issue should not be heard as prayed for in said petition and, after hearing and consideration

thereof, the said rule is made absolute. For authority for this order see Section 274 (b) of the Judicial Code (28 U. S. C. A. 398); New York Life Insurance Co. v. Marotta *et al.*, 57 Fed. (2) 1038 (CCA 3); Order of Judge Schoonmaker of this Court in the case of Adamos v. New York Life Insurance Co., No. 7424 Law; Phillips-Morefield v. Southern State Life Insurance Co., 66 Fed. (2) 29 (CCA 5); Liberty Oil Co. v. Condon National Bank *et al.*, 260 U. S. 235; Opinion of Judge Gibson of this Court, 47 Fed. (2) 935; New York Life Ins. Co. v. Hurt, 35 Fed. (2) 92 (CCA 8); Same case 41 Fed. (2) 392 (D. C., D. K., 2nd Div.); same case 51 Fed. (2) 936 (CCA 10); Peake v. Lincoln National Life Insurance Co., 15 Fed. (2) 303 (CCA 8), and Union Pacific R. Co. v. Syas, 246 Fed. 561 (CCA 8).

BY THE COURT,

V."

"PLAINTIFF'S EXCEPTION

At request of plaintiff, exception granted to the above order and bill sealed.

NELSON MCVICAR (SEAL)

D. J."

SACHS & CAPLAN,
Attorneys for Plaintiff.

Praecipe for Record on Appeal.

(Filed Jan. 17, 1934.)

To J. Wood Clark,
Clerk.

Sir:

Incorporate the following portions of the record into the transcript for the appeal in the above entitled case:

(1) Copy of docket entries;
(2) The exemplification of record from Court of Common Pleas for Allegheny County;
(3) The affidavit of defense;
(4) The reply to new matter;
(5) The praecipe for issue;
(6) The petition of defendant and order entered thereon, granting rule on plaintiff to show cause why hearing in equity should not be granted;
(7) The answer of plaintiff to petition of defendant for hearing in equity;
(8) The order of court making rule absolute and plaintiff's exception thereto;
(9) The petition and order for the appeal;
(10) The assignments of error;
(11) This praecipe and the acceptance of service thereof.

Sachs & Caplan,
Attorneys for Plaintiff.

ACCEPTANCE OF SERVICE

Service of the above accepted this 17th day of January, 1934.

Smith, Buchanan, Scott & Gordon,
Attorneys for Defendant.

Certificate of Clerk.

Western District of Pennsylvania, ss.:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record on appeal in the above entitled case, so full and entire, as the same remains on record and file in my office in the City of Pittsburgh, in said district, in accordance with the notice filed by counsel.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said Court, at Pittsburgh, this .....day of....., A. D. 19...., and the Independence of the United States the 158th

J. Wood Clark,

(seal) *Clerk.*

[fol. 1] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5414

SARAH ENELOW, Appellant,

vs.

NEW YORK LIFE INSURANCE Co., Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

And now, to wit: This 16th day of March A. D. 1934, it is ordered that Hon. Oliver B. Dickinson, District Judge for the Eastern District of Pennsylvania, and Hon. Guy L. Fake, District Judge for the — District of New Jersey, be, and they are hereby, assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

[fol. 2] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5414

SARAH ENELOW, Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, Appellee

And afterwards, to wit, the 16th day of March, 1934, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, Circuit Judge, and Honorable Oliver B. Dickinson and Honorable Guy L. Fake, District Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of April, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 3] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5414

SARAH ENELOW, Plaintiff-Appellant,

v.

NEW YORK LIFE INSURANCE COMPANY, Defendant-Appellee

Appeal from the Order of the District Court of the United States for the Western District of Pennsylvania

OPINION—Filed April 17, 1934

Before Davis, Circuit Judge, Dickinson and Fake, District Judges

Per CURIAM:

This Appeal is ruled by the Banker v. Ford Motor Company case, the opinion in which was handed down March 13th, 1934. The Appeal relates to the practice established by 274b of the Judicial Code. That Act has a very definite primary objective. There were jurisdictions in which purely equitable defenses were not admitted in actions at law. If there was such equitable defense resort must be had to a Chancellor to determine it, the action at law in the meantime being held up. The purpose of the Act was to [fol. 4] do away with the necessity of appealing to a Court of Equity as such by permitting equitable defenses to be pleaded and heard in all actions at law. There was no need for such an Act in Pennsylvania for the reason that equitable defenses were always permitted in actions in assumpsit in that State and were determined by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor. The Act of Congress applies to actions in Pennsylvania whether needed or not. The Act does not however affect or change the substantive law but is directed wholly to procedural methods. The law of the case and the principles of equity applicable thereto remain as they were. The only change wrought is in the method of applying the law or the equities of the case and how and by what tribunal they are to be determined. This makes of importance the second purpose of the Act. This was to require equitable defenses to be heard in limine by

the Trial Court as if sitting in Equity, thereby requiring that they be heard by the Court as by a Chancellor without the aid or intervention of a jury, thus withdrawing equitable defenses from the jury. The Act, as we have said, applies in its entirety to actions in Pennsylvania as to actions elsewhere.

The decree of the Court below is affirmed, with costs.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 5] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5414

SARAH ENELOW, Appellant,

vs.

NEW YORK LIFE INSURANCE CO., Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, April 17, 1934.

J. Warren Davis, Circuit Judge.

Endorsements: Order Affirming Decree, with costs. Rec'd & Filed Apr. 17, 1934. Wm. P. Rowland, Clerk.

[fol. 6] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify

the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Sarah Enelow, Appellant, vs. New York Life Insurance Co., Appellee, No. 5414, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 25th day of April, in the year of our Lord one thousand nine hundred and thirty-four and of the Independence of the United States the one hundred and fifty-eighth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 52] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5503-C)

FILE COPY

MAY 1

CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted] 47

SARAH ENELOW,

Petitioner
(Appellant Below),

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent
(Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for Petitioner.

1124 Frick Building,
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BATAVIA TIMES, LAW PRINTERS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Sarah Enelow, the above named petitioner, respectfully prays that a writ of certiorari issue to review the decree (R. 50) of the United States Circuit Court of Appeals for the Third Circuit entered on April 17th, 1934, affirming the decree (R. 44) of the United States District Court for the Western District of Pennsylvania, dated January 2nd, 1934, and made by Judge McVicar, ordering that the defense of fraud made in the affidavit of defense, in an action at law, be heard by a chancellor according to equity procedure.

Statement.

On July 11th, 1933, petitioner, the widow of Max Enelow, filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania (R. 2), to recover the sum of five thousand ($5,000.00) dollars on a life insurance policy dated December 30th, 1931, issued by respondent on the life of her husband who died on May 27th, 1933. A jury trial was demanded (R. 10).

On August 9th, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 22).

On October 7th, 1933, respondent filed an affidavit of defense (R. 25) in which it set up the defense that

the insured obtained said policy by means of false and fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policy be surrendered, cancelled and rescinded.

On December 15th, 1933, respondent filed a petition for a hearing in equity (R. 36), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure without a jury, and preferably in advance of a jury trial at law, pursuant to section 274(b) of the Judicial Code (28 USCA Sec. 398).

On December 22nd, 1933, petitioner filed an answer to said petition, in which she averred that respondent's defense to said action is one pleadable at law and that can be made fully effective as a defense at law, and that respondent has a plain, adequate and complete defense at law; that the prayer for cancellation of said policy is wholly unnecessary, as a judgment at law for respondent will fully end petitioner's case. She therefore prayed that respondent's petition be dismissed.

On January 2nd, 1934, the court made an order (R. 39) granting the prayer of respondent's petition and ordering that the equitable issue referred to in said petition be heard by a chancellor according to equity procedure in advance of a trial by a jury at law of any legal issue.

On April 17th, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court.

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398 printed in Appendix hereto) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be in violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Reasons Relied on for the Allowance of the Writ.

A.

This court has ruled that where a party has a good defense at law to a purely legal demand, he should be left to that means of defense; that where a life insurance company has been sued on a policy which it claims was obtained by means of false representations, it has a plain, adequate and complete remedy at law by pleading that defense in the law suit and has no occasion to resort to a court of equity for relief. The order com-

plained of overturns that rule upon an erroneous construction of the Act of March 3, 1915, section 274(b) of the Judicial Code (28 USCA Sec. 398).

B.

The order complained of denies a trial by jury in a case which, prior to the passage of the Act of March 3rd, 1915, was triable only before a jury.

C.

The Act in question, as this court has held, is a procedural statute. It does not confer new jurisdiction upon courts of equity. If it did, it would violate the Seventh Amendment to the Constitution of the United States.

D.

The proper construction of section 274(b) of the Judicial Code is of the highest importance. Whether it has the effect of abolishing the right of trial by jury in cases where the right existed prior to the enactment should be settled by this court.

E.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018, (certiorari denied, 289 U. S. 735).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of

the Circuit Court of Appeals for the Third Circuit, should be granted.

SARAH ENELOW

By

CHAS. H. SACHS

LOUIS CAPLAN

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is not reported but is found at page 39 of the record. The opinion of the Circuit Court of Appeals is not reported and is found at page 49 of the record.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 17, 1934. Jurisdiction to issue the writ is found in the provisions of Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938.

III.

Statement of the Case.

The principal facts are stated in the foregoing petition.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court, dated December 15th, 1933.

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated December 15th, 1933.

3. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should be denied.

V.

Argument.

Petitioner is the only person having an interest in the policy sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policy. Respondent has not, in its affidavit of defense (R. 25) nor in its petition for hearing in equity (R. 36), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied a preventative remedy, or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Schoenthal vs. Irving Trust Co., 287 U. S. 92, and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policy before the statute was enacted, it cannot now have its defense treated as a controversy in equity, triable before a chancellor.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dictionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar*. That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardoza defined "equitable defenses" in Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> 'Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*' " (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury".

It was not our contention that the order appealed from was improper in this case because the statute was not needed in Pennsylvania. We based our objection on the ground that respondent had an adequate remedy at law and that it could not have invoked the aid of a court of chancery to grant it relief. If this cause had been permitted to remain in the Pennsylvania court, it would not be tried "by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor" (R. 49). It is difficult to perceive how a court and jury could sit as a chancellor. If this case were tried before a court and jury in Pennsylvania, their respective functions would be precisely the same as that of a court and jury in any other law suit. The jury would not be sitting, merely, to advise the conscience of a chancellor. Their verdict, on the facts, would be as binding as in any action at law.

Conclusion.

The use which has been made of Section 274 (B) of the judicial code to deny the right of trial by jury is a perversion of its purpose and it is extremely important that this Court shall so declare.

Respectfully submitted,

CHARLES H. SACHS

LOUIS CAPLAN
Counsel for Petitioner.

APPENDIX.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

– – – – – – –

SECTION 274b OF THE JUDICIAL CODE:

"Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." (Mar. 3, 1915, c. 90, 38 Stat. 956.)

– – – – – – –

SECTION 384 OF THE JUDICIAL CODE:

"Suits in equity, when not sustainable. Suits in Equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." (R. S. §723; Mar. 3, 1911, c. 231, §267, 36 Stat. 1163.)

FILE COPY

FILED
JUL 25 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. [redacted] 47

SARAH ENELOW, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY, Respondent (Appellee Below).

REPLY BRIEF ON BEHALF OF PETITIONER.

CHARLES H. SACHS,
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Reply Brief on Behalf of Petitioner.

Respondent, while saying it "does not oppose the granting of a writ of certiorari" gives two reasons why the decision of the Court below should be sustained.

1. Respondent says (Mem. for Resp. 4): "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them: in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief" (citing cases).

There are two answers to this contention. In the first place, the policy provides (R. 13):

> "The policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this Policy when issued."

Recognizing the effect of the above provision and that because thereof the respondent has to prove "knowledge of the falsity" of the answers, respondent pleads such knowledge as follows (R. 31):

> "15. Said answers were made by Max Enelow with knowledge of their falsity and fraudulently for the purpose of procuring said insurance."

It is not necessary to cite cases to establish the proposition that a party must prove his case, as pleaded. In view, therefore, of the contract and the charge in the affidavit of defense, it would seem to be misleading to argue that respondent has no adequate remedy at law in pleading as a defense, in the law suit, the alleged answers claimed to have been *knowingly and fraudulently* made and that only a court of equity can give it adequate relief because in equity it can win its case by merely showing that the answers were material and untrue and without proof that they were made knowingly and with fraudulent intent. Surely they cannot mean that because they were able to get the order of Court that this case be tried by a chancellor according to equitable procedure, they have somehow gotten the issues made up by the pleadings changed in some manner, so that they do not have to prove all of the facts which they set out as their defense in the affidavit of defense.

In the next place, it is difficult to conceive of such a strange animal as an innocent fraud,—a fraud perpetrated without knowledge of the falsity of the fraudulent representation. If a man makes false statements, recklessly, and without any reasonable basis, he can be held to the same consequences as a man who makes false statements knowingly. He *is* a fraud for he is impliedly representing that he *knows* the facts with reference to certain matters when he does not. It is true that in the case of Smith vs. Richards, 38 U. S. 26, which was a bill to rescind a contract for the purchase of a gold mine because of fraudulent representations, the Court said that even

though the appellant made the representations under the influence of delusion, it is sufficient for the decision of *that* case if it be established that the representation was untrue in material parts of it. But the Court, in Southern Development Company vs. Silva, 125 U. S. 247, where it dismissed a similar bill, stated that one of the elements necessary to be established was that the alleged false representation was not actually believed by the defendant, on reasonable grounds, to be true.

What this Court said in the Smith-Richards case, *supra,* on the subject of fraud applies as well in a case at law:

> "Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know, or believes to be true, is equally, in morals and *law,* as unjustifiable as the affirmation of what is known to be positively false." (Italics ours.)

Can it be doubted that if a jeweler innocently misrepresents a watch-case to be solid gold, 18 karat fine, when as a matter of fact it is only gold-filled, or 14 karat fine, the purchaser may, on discovery of the fact, recover the money paid for the watch in an action at law even if the jeweler, to acquit himself of the charge of deliberate misrepresentation, showed that the watch was sent to him by a reputable manufacturer as of the quality represented?

Unfortunately, ill considered expressions are to be found in some cases to the effect that in law the complaining party must prove not only the falsity of the

statements but that the party making them had knowledge of their falsity and that in equity the last element is immaterial. The answer to the apparent conflict in the cases is this: If a man makes representations of fact as regards a matter about which he has knowledge, or about which he is *presumed* to have knowledge, as when a man is "talking up" a piece of property of his, and describes its qualities and characteristics, and it appears that these representations were untrue, the contract will be rescinded in a court of equity, or the maker of the representations will be compelled, in a Court of law, to refund the consideration that he received as a result of the misrepresentations, regardless of whether he knew them to be false or not. But, on the other hand, when the misrepresentation consists of *an answer given in response to a question* and it is plain to be seen that the question is intended to elicit *the information that the party has* upon the subject, or an opinion, and nothing else, if the answer is given honestly and in good faith, he cannot be held for the incorrectness of the answer unless he makes his answer a warranty. When an insurance company, in its printed inquiries contained in the application, asks the applicant, for instance, whether he has cancer, the question can't be understood in any other way than to mean: "Have you cancer, to your knowledge, or in your opinion?" We all know that the disease is an insidious one and a person having it may not suspect it until it is in an advanced stage. The insurance company certainly cannot be heard to say that it meant and expected to get an answer "Yes" from a man who did not suspect that he had cancer. It was in recognition of this prin-

ciple that there was inserted in the policy the provision cited above: "All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

While the exact question that was put to the defendant in the case of Southern Development vs. Silva, *supra,* was in dispute, yet the essence of it related to the extent of the work that had been done in the mine (p. 257), and when the intending purchaser asked the seller as to that, he must also be understood to have been inquiring as to the extent of the work done in the mine *according to the seller's knowledge.* He would have been foolish to expect the seller to tell him of any work done in the mine of which the seller was ignorant. If the matter was sufficiently material to the purchaser, he could by agreement, have made the answer a warranty. And as this was not done, the Court held in that case that even though the representation was untrue, since it was not shown that the seller knew it was untrue, the contract would not be rescinded on that ground. The fine illuminating opinion of Judge Hook in Kimber vs. Young, 137 Fed. 744 (C. C. A. 8th Cir.) will help to clear away the confusion. The cases merely hold that the action for *deceit* at common law is founded upon fraud and that the scienter must be proved. And it is equally necessary to prove deceit,—fraud,—of which the scienter is an indispensable ingredient, in a bill of equity, if deceit or fraud is therein charged. The Kimber case shows many instances of charges of fraud and deceit where the representation, upon a careful examination, proved to be only the expression of an opinion and not a representation of an alleged fact.

2. Respondent says (Mem. for Resp. 5):

> "The petitioner is not the only person having an interest in the policy sued on, as stated in her brief. If the policy of insurance, which is the subject of the litigation, was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate and not to the beneficiary, the petitioner. The executors of Max Enelow Estate are Anna Katz and Meyer Enelow. These persons are not parties to the present suit. That the petitioner is not the only person with an interest in the subject-matter follows as a matter of law and therefore that legal conclusion need not be pleaded."

Respondent then cites a case to establish the proposition that the remedy at law "must be in all respects equal to that in equity in order to oust the latter of jurisdiction." In other words, the respondent hints that equity, or what amounts to the same thing, the trial of this issue before a chancellor according to equitable principles, can give respondent more complete relief than a Court of law can give it. The above seems to be predicated upon the hope that this Court will overlook the fact that the executors, if they have any interest,—and they have not,—*are not parties to the controversy that would be heard by the chancellor* any more than they are to the law suit? A decree of a chancellor in this case would be no more binding upon the executors than a judgment in the action at law

There is nothing in this contention from any aspect. Hundreds of cases have been defended by insurance companies on the ground of fraud. They asserted their defense and the Courts sustained them, or did not sustain them. In those cases where they were sus-

tained, and where it was held that the policies were procured by fraudulent misrepresentations, no one, we believe, raised the point that the executors of the assured could then bring a suit. For what? For the amount of the policy? The executors were not the beneficiaries. And if there is a question as to who is entitled to the few dollars of premiums which they tendered, why did the respondent in this case tender it to the petitioner, the beneficiary? (Aff. Def, Par. 16, R. 31). If this point is a good one, it should have been raised in the case of Pheonix Mutual Life Insurance Co. v. Bailey, 80 U. S. 616, as a separate ground for equitable jurisdiction over the bill to cancel.

Respondent says in its memorandum (p. 3): "There was no provision in the law when those cases (Phoenix Mutual, *supra,* Cable, *supra,* Buzzard vs. Houston, 119 U. S. 347, and Hipp vs. Baben, 19 How. 271) were decided for the introduction of equitable defenses in actions at law". Does respondent mean to contend by this that if A brought a suit at law against B to recover the price of a mine which he sold to B, and the latter defended on the ground that he was induced to buy it by false and fraudulent representations made by A, that such defense could not be heard, and that judgment must go for the plaintiff regardless of the defense? Or does he mean that such an extraordinary situation would have resulted if the suit were brought in a Federal Court prior to the enactment of Section 274 (b) of the Judicial Code?

Respondent realized that the burden was upon it to show that it was without adequate remedy at law.

The only things it could offer were the alleged difference in the degree of proof required to establish fraud in a Court of equity and the statement that the executors of the assured were not parties to the suit, apparently being willing to overlook the facts that by its policy and affidavit of defense it was required to prove knowledge of falsity, that the executors were not parties to the controversy to be heard by the chancellor, either, and that respondent had tendered a refund of the premium to *petitioner*.

Respondent's inability to offer any better reasons demonstrates the impropriety of making use of Sec. 274 (b) of the Judicial Code to deny to petitioner the constitutional right of trial by jury.

Respectfully submitted,

CHARLES H. SACHS,

LOUIS CAPLAN,
Counsel for Petitioner.

FILE COPY

OCT 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 47.

SARAH ENELOW, Petitioner, Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 47.

SARAH ENELOW, Petitioner, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY.

PETITIONER'S BRIEF.

This case comes to this Court on a writ of certiorari to review a decree (R. 50) of the United States Circuit Court of Appeals for the Third Circuit entered on April 17, 1934, affirming the decree (R. 44) of the United States District Court for the Western District of Pennsylvania, dated January 2, 1934, and made by Judge McVicar, ordering that the defense of fraud made in the affidavit of defense, in an action at law, be heard by a chancellor according to equity procedure.

Opinions Below.

The opinion of the District Court is not reported but is found at page 39 of the record. The opinion of the Circuit Court of Appeals is reported at 70 F. (2d) 728, and is found at page 49 of the record.

Jurisdiction.

Jurisdiction to review this case is found in the provisions of sec. 240-a of the Judicial Code as amended by the Act of February 13, 1925 c. 229, sec. 1, 43 Stat. 938; (28 USCA sec. 347).

The statute involved is sec. 274 (b) of the Judicial Code (28 USCA Sec. 398, Act of March 3, 1915, c. 90, 38 Stat. 956) which provides as follows:

> "Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

The judgment of the Circuit Court of Appeals was entered on April 17, 1934. The petition for a writ of certiorari was filed on May 17th, 1934 and was granted on October 8th, 1934. The said judgment affirmed the decree (R. 44) of the District Court, ordering that the defense of fraud made in the affidavit of defense in an action at law be heard by a chancellor according to equity procedure.

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be in violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Statement.

On July 11th, 1933, petitioner, the widow of Max Enelow, filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania (R. 2), to recover the sum of five thousand ($5,000.00) dollars on a life insurance policy dated December 30th, 1931, issued by respondent on the life of her husband who died on May 27th, 1933. A jury trial was demanded (R. 10).

On August 9th, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 22).

On October 7th, 1933, respondent filed an affidavit of defense (R. 25) in which it set up the defense that the insured obtained said policy by means of false and fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policy be surrendered, cancelled and rescinded.

On December 15th, 1933, respondent filed a petition for a hearing in equity (R. 36), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure without a jury, and preferably in advance of a jury trial at law, pursuant to section 274(b) of the Judicial Code (28 USCA Sec. 398).

On December 22nd, 1933, petitioner filed an answer to said petition in which she averred that respondent's defense to said action is one pleadable at law and that can be made fully effective as a defense at law and that respondent has a plain, adequate and complete defense at law; that the prayer for cancellation of said policy is wholly unnecessary, as a judgment at law for respondent will fully end petitioner's case. She therefore prayed that respondent's petition be dismissed.

On January 2nd, 1934, the court made an order (R. 39) granting the prayer of respondent's petition and ordering that the equitable issue referred to in said

petition be heard by a chancellor according to equity procedure in advance of a trial by a jury at law of any legal issue.

On April 17th, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court.

On October 8th, 1934, this court granted this writ of certiorari.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court dated December 15th, 1933.

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated December 15th, 1933.

3. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should be denied.

Summary of Argument.

Section 274 (a) of the Judicial Code (28 USCA sec. 398) does not authorize the application made by respondent to have its defense of fraud made in its affidavit of defense, in an action at law, heard by a chancellor, according to equity procedure.

Respondent, on the facts presented by the record, has no right to equitable relief.

If section 274 (b) of the Judicial Code is to be construed as to extend the jurisdiction of the federal

equity court to situations over which it had no jurisdiction prior to said enactment, it is in violation of the seventh amendment to the constitution of the United States.

ARGUMENT.

Completeness of respondent's remedy in law suit.

Petitioner is the only person having an interest in the policy sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policy. Respondent has not, in its affidavit of defense (R. 25), or in its petition for hearing in equity (R. 36), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied a preventative remedy or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Schoenthal vs. Irving Trust Co., 287 U. S. 92, and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policy before the statute was enacted, it cannot now have its defense treated as a controversy in equity triable before a chancellor.

Meaning of "Equitable defense" as used in statute.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dicitionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar*. That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardozo defined "equitable defenses" in Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> "Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*' " (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

Only formal distinction abolished.

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury."

In Smith v. American Nat. Bank, 89 Fed. 832 (C. C. A. 8th Cir.) the court, at page 838, after quoting the seventh amendment of the constitution,* said:

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* "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment VII to the Constitution of the United States.

> "The effect of this provision is to declare that the right of trial by jury shall depend neither on legislative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to secure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law."

In Union Pacific Railroad Company vs. Syas, 246 Fed. 561, 565, (C. C. A., 8th Cir.), the court said:

> "This statute (sec. 274b of the Judicial Code) brings into the federal courts the procedure that has long prevailed in many of the states where Codes of Civil Procedure have been adopted. The statute is intended to prevent a circuity of action by allowing the rights of either party to an action at law, whether legal or equitable, in respect to one subject-matter, to be determined in one action; but, while the statute permits the granting of equitable relief in an action at law, Congress did not intend, in our opinion, to change in any way, except as to procedure, the essential distinction between law and equity. Basey v. Gallagher, 20 Wall. 670, 22 L. ed. 452, and Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800."

Conflicting constructions of statute by C. C. A. of 5th Cir.

The Circuit Court of Appeals for the Fifth Circuit had before it the question here involved in the cases of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018 (certiorari denied 289 U. S. 735), and Phillips-Morefield *et al.* v. Southern States Life Insurance Company, 66 F. (2d) 29, and reached diametrically opposite conclusions in the two cases.

In the American Cyanamid case the defendant, after filing an answer to a law action, filed a so-called equitable plea which alleged fraud and prayed the court, sitting as chancellor, to take jurisdiction, require a reply as provided by statute, and, on final trial, annul and cancel the plaintiff's claim, and that, pending such determination as the chancellor will make, proceedings on the law side of the court be suspended as though enjoined by bill in equity. In refusing the prayers, the court, at page 1020, said:

> "Equity is not over objection to assume jurisdiction because of either (equitable estoppels and questions of fraud) if the remedy at law is plain, adequate and complete; *nor will a prayer for an unnecessary cancellation serve as an excuse* (citing cases). The prayer for a cancellation of Wilson & Toomer Company's claim against Cyanamid Company may be put aside. A judgment at law for the defendant will effectually end it. One for the plaintiff will merge it. There is no written instrument capable of future harm to be cancelled." (Italics ours.)

In the Phillips-Morefield case, the court said:

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of N. Y. Life Ins. Co. v. Marshall, 23 F. (2d) 225, decided by this court, and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged

> in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915, adding section 274b to the Judicial Code (28 USCA Sec. 398)."

The opinion in the American Cyanamid case, we submit, is well reasoned. The opinion in the Phillips-Morefield case gives no reason for its conclusion. It merely says the situation is now different from what it was when the cases of N. Y. Life Insurance Co. v. Marshall, 23 F. (2d) 225 and Phoenix Mutual Life Ins. Co. v. Bailey, 13 Wall. 616 were decided because of the passage of the Act of March 3, 1915, section 274(b) of the Judicial Code. It does not explain in what respect the situation is now different. Its strange conclusion is at variance with what this court said in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235.

New York Life Insurance Company vs. Marotta, 57 F. (2d) 1038, (C. C. A. 3rd Cir.), cited by Judge McVicar of the District Court, did not have our side of the case presented to the Circuit Court of Appeals. We have examined the appellees' brief in that case and find that the appellees entirely ignored the question whether, under a situation such as presented here, the court could under sec. 274(b) of the Judicial Code dispose of the defense as a case in equity.

The editor of the United States Code Annotated, in a note to Title 28, sec. 398, in the 1933 Cumulative Annual Pocket Part makes a conjecture that the word "of" was inadvertently used in sec. 274(b) of the Judicial Code for the word "or". That statement is due

to a superficial reading. It is plain that the draftsman of the Act was referring to a defense which embodied a prayer for equitable relief, that is, affirmative relief. The sentence would be crude if it read as suggested, namely, "The defendant shall have the rights in such case as if he filed a bill embodying the defense *or* seeking the relief prayed for in such answer or plea." The draftsman did not mean a defense which consisted of nothing more than an assertion that a money judgment should not be entered against the defendant because the instrument sued on was obtained from him by fraud. That he used the right word cannot be open to doubt when the purpose sought to be accomplished by the statute is perceived. The editor says that the word "of" appears in the original statute.

Respondent, while saying it did not oppose the granting of a writ of certiorari, gave two reasons why the decree of the court below should not be disturbed. The first reason was:

Fraud—unsound claim of different tests

> "There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief." (Mem. for Resp. 4.)

There are two answers to this contention. In the first place, the policy provides (R. 13):

> "The policy and the application therefor, copy of which is attached hereto, constitute the entire

> contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is endorsed upon or attached to this Policy when issued."

Recognizing the effect of the above provision and that because thereof respondent has to prove "knowledge of the falsity" of the answers, respondent pleads such knowledge as follows (R. 31):

> "15. Said answers were made by Max Enelow with knowledge of their falsity and fraudulently for the purpose of procuring said insurance."

It is not necessary to cite cases to establish the proposition that a party must prove his case, as pleaded. In view, therefore, of the contract and the charge in the affidavit of defense, it is difficult to understand how respondent can seriously advance the proposition that it has no adequate remedy at law in pleading as a defense, in the lawsuit, the alleged answers claimed to have been *knowingly and fraudulently* made and that only a court of equity can give it adequate relief because in equity it can win its case by merely showing that the answers were material and untrue and without proof that they were made knowingly and with fraudulent intent. Surely they cannot mean that because they were able to get the order of court that this case be tried by a chancellor according to equitable procedure, they have gotten the issues made up by the pleadings changed in some manner, so that they do not have to prove *all* of the facts which they set out as their defense in the affidavit of defense.

In the next place, it is difficult to conceive of such a strange animal as an innocent fraud,—a fraud perpetrated without knowledge of the falsity of the fraudulent representation. If a man makes false statements, recklessly, and without any reasonable basis, he can be held to the same consequences as a man who makes false statements knowingly. He *is* a fraud for he is impliedly representing that he *knows* the facts with reference to certain matters when he does not. It is true that in the case of Smith vs. Richards, 38 U. S. 26, which was a bill to rescind a contract for the purchase of a gold mine because of fraudulent representations, the court said that even though the appellant made the representations under the influence of delusion, it is sufficient for the decision of *that* case if it be established that the representation was untrue in material parts of it. But the court, in Southern Development Company vs. Silva, 125 U. S. 247, where it dismissed a similar bill, stated that one of the elements necessary to be established was that the alleged false representation was not actually believed by the defendant, on reasonable grounds, to be true.

"Innocent" fraud

What this court said in the Smith-Richards case, *supra,* on the subject of fraud applies as well in a case at law:

> "Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial, for the affirmation of what one does not know, or believe to be true, is equally, in morals and *law,* as unjustifiable as the affirmation of what is known to be positively false." (Italics ours.)

Can it be doubted that if a jeweler innocently misrepresents a watch-case to be solid gold, 18 karat fine, when as a matter of fact it is only gold-filled, or 14 karat fine, the purchaser may, on discovery of the fact, recover the money paid for the watch in an action at law?

Unfortunately, ill considered expressions are to be found in some cases to the effect that in law the complaining party must prove not only the falsity of the statements but that the party making them had knowledge of their falsity and that in equity the last element is immaterial. The answer to the apparent conflict in the cases is this: If a man makes representations of fact as regards a matter about which he has knowledge, or about which he is *presumed* to have knowledge, as when a man is "talking up" a piece of property of his, and describes its qualities and characteristics, and it appears that these representations were untrue, the contract will be rescinded in a court of equity, or the maker of the representations will be compelled, in a court of law, to refund the consideration that he received as a result of the misrepresentations, regardless of whether he knew them to be false or not. But, on the other hand, when the misrepresentation consists of *an answer given in response to a question* and it is plain that the question is intended to elicit *the information that the party has* upon the subject, or an opinion, and nothing else, if the answer is given honestly and in good faith, he cannot be held for the incorrectness of the answer unless he makes his answer a warranty. When an insurance company, in its printed inquiries contained in the application, asks the applicant, for instance, whether he has can-

cer, the question can't be understood in any other way than to mean: "Have you cancer, to your knowledge, or in your opinion?" We all know that the disease is an insidious one and that a person having it may not suspect it until it is in an advanced stage. The insurance company certainly cannot be heard to say that it meant and expected to get an answer "Yes" from a man who did not suspect that he had cancer. It was in recognition of this principle that there was inserted in the policy the provision cited above: "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

While the exact question that was put to the defendant in the case of Southern Development vs. Silva, *supra,* was in dispute, yet the essence of it related to the extent of the work that had been done in the mine (p. 257), and when the intending purchaser asked the seller as to that, he must also be understood to have been inquiring as to the extent of the work done in the mine *according to the seller's knowledge.* He would have been foolish to expect the seller to tell him of any work done in the mine of which the seller was ignorant. If the matter was sufficiently material to the purchaser, he could by agreement have made the answer a warranty. And as this was not done, the court held in that case that even though the representation was untrue, since it was not shown that the seller knew it was untrue, the contract would not be rescinded on that ground. The fine illuminating opinion of Judge Hook in Kimber vs. Young, 137 Fed. 744 (C. C. A. 8th Cir.) will help to clear away the confusion. The cases merely hold that the *action for deceit at common law*

is founded upon fraud and that the scienter must be proved. And it is equally necessary to prove deceit, —fraud— of which the scienter is an indispensable element, in a bill in equity, if deceit or fraud is therein charged. The Kimber case shows many instances of *charges* of fraud and deceit where the representation, upon a careful examination, proved to be only the expression of an opinion and not a representation of an alleged fact.

The second reason given by respondent for sustaining the decree of the court below was as follows (Mem. for Resp. 5):

> "The petitioner is not the only person having an interest in the policy sued on, as stated in her brief. If the policy of insurance, which is the subject of the litigation, was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate, and not to the beneficiary, the petitioner. The executors of Max Enelow's estate are Anna Katz and Myer Enelow. These persons are not parties to the present suit. That the petitioner is not the only person with an interest in the subject matter of this litigation follows as a matter of law and therefore that legal conclusion need not be pleaded."

Unsound contention of other interest,—Only petitioner can sue on policy

Respondent then cites a case to establish the proposition that the remedy at law "must be in all respects equal to that in equity in order to oust the latter of jurisdiction." In other words, the respondent hints that equity, or what amounts to the same thing, the trial of this issue before a chancellor according to equitable principles, can give respondent more complete relief than a court of law can give it. The above seems to be predicated upon the hope that this court will overlook the fact that the executors, if they

No additional parties in equity hearing

have any interest,—and they have not,—*are not parties to the controversy that would be heard by the chancellor* any more than they are to the law suit? A decree of a chancellor in this case would be no more binding upon the executors than a judgment in the action at law.

There is nothing in this contention from any aspect. Hundreds of cases have been defended by insurance companies on the ground of fraud. They asserted their defense and the courts sustained them, or did not sustain them. In those cases where they were sustained and where it was held that the policies were procured by fraudulent misrepresentations, no one, we believe, raised the point that the executors or administrators of the assured could then bring a suit. For what? For the amount of the policy? The personal representatives were not the beneficiaries. And if there is a question as to who is entitled to the few dollars of premiums which they tendered, why did the respondent in this case tender them to the petitioner, the beneficiary? (Aff. Def. Par. 16, R. 31.) If this point is a good one, it should have been raised in the case of Phoenix Mutual Life Insurance Co. v. Bailey, 80 U. S. 616, as a separate ground for equitable jurisdiction over the bill to cancel.

Exceptions to rule against bills to cancel

We do not contend that insurance companies can under no circumstances file bills to cancel policies on the ground of fraud. Insurance companies have in modern times been tempting people to buy insurance by incorporating in the policies a provision that the policy shall be incontestable except for non-payment of premiums after a certain period. This provision, at first purely voluntary, later became compulsory

when legislatures, finding it necessary to regulate the business, took a leaf out of the insurance companies' books and made it compulsory. But a policy containing such a provision presented an anomalous situation. The alleged fraud of the insured in procuring the policy is a defense to an action on it, but only for a certain period after its issuance. When that period has passed the alleged fraud is forgiven. Public interest in protecting and preserving the rights of beneficiaries of life insurance against claims of insurance companies that they were misled into issuing the insurance by the answers to the many involved questions supposed to have been put to the applicant by their agents, enforced these provisions in spite of the well-known principe that "fraud vitiates all contracts."*

As it was possible that a suit might not be brought on a policy within the contestable period, courts have allowed them to make a contest within the contestable period by filing a bill to cancel. The ground for jurisdiction over such bills, however, is not as counsel for defendant claims "because the defense is clearly an equitable one", for, as we have shown, this court in the case of Phoenix Mutual Life Insurance Company vs. Bailey, *supra,* said that federal courts of equity do *not* have jurisdiction of bills to cancel policies for fraud where that charge can be made fully effective as a defense to a suit at law. In other words, it was because of an entirely different principle of equity jurisprudence that the bills were entertained, viz.: that

* To circumvent the requirements of the statutes (R. pp. 7-8) that a copy of the application must be attached to the policy so that the applicant might know what answers the agents wrote into the application, the companies attach such microscopic photostats of the application that they either cannot be read at all or cannot be read except with considerable difficulty and eye-strain. The purpose is to discourage the reader. No legitimate reason can be given for these miniature copies. An interesting case on the subject is New York Life Insurance Company vs. Halpern, 57 F. (2d) 200, affirmed 61 F. (2d) 1037.

the plaintiff *had no adequate remedy at law* for it was within the power of the holder of the policy to postpone the bringing of the suit until after the contestable period had expired. And even if a suit to recover on a policy was brought within the contestable period, *if all of the parties having an interest in the policy were not included as plaintiffs,* a judgment that the policy was obtained by fraud would not be binding against the absent parties. Insurance companies were, therefore, permitted in such exceptional cases to maintain bills to cancel policies, notwithstanding the institution of the prior action at law against them.

In all of the *reported* cases, except one, that we have come across where a bill to cancel a policy was sustained, the bill was either filed *before* the lawsuit was brought on the policy, or if it was filed after the suit the lawsuit *did not have in it as plaintiffs* all of the persons having an interest in the policy. The overwhelming number of cases where federal courts have held that bills to cancel policies were maintainable were those of the first class above referred to, namely, those in which the bill was filed *before* any action at law was instituted.

In New York Life Ins. Co. v. Hurt, 35 F. (2d) 92, the court held that the "contest" contemplated in incontestable clauses of life insurance policies may be made either by equitable action to cancel policy or by answer in the suit at law brought to recover under the policy, citing a number of cases which it termed "the great number and weight of authority" on the point.

The point of that decision is that what the respondent in this case has done, namely, to file a defense setting up the alleged fraud, *is* the initiation of a contest;

that it *had* put itself within the protection afforded it by the policy, and that regardless of whatever becomes of that lawsuit, respondent has made a contest within the contestable period upon the grounds set forth in the affidavit of defense. There is therefore gone, so far as this case is concerned, *the entire basis* upon which courts of equity have been entertaining bills to cancel insurance policies.

As stated, the Hurt case also belongs to the second class of cases referred to by us above, cases where the insurance company pleads that it ought to be allowed to maintain a bill, notwithstanding the institution of the prior lawsuit, because it is seeking relief *against someone else besides the plaintiff in the lawsuit.* That cannot be here. If the policy in the case at bar be cancelled by a chancellor, the decree runs against the plaintiff in the lawsuit,—no one else.

In the Hurt case the *assignees* of an insurance policy first brought an action at law. The company then *filed a bill* praying cancellation for fraud not only against the assignee, but also against the widow as "the first person to be entitled to be named as administrator of the estate of" the assured. The court said on this point (p. 95):

> "Does the fact that the defense might have been made by answer, within the period, nullify the effect of filing the equitable action and thus deprive the company of the defenses set up in such action? We think not under the circumstances of this case. Here the law action on the policy was brought by the assignees thereof alone. The policy was assignable, but was issued in favor of 'The Executors, Administrators or Assigns of the Insured, or to the duly Designated Beneficiary.' The company had the right to protect itself against all claims from any one upon the policy.

> In the law action, such protection was only against the assignees who were the only plaintiffs therein at the time. The only way in which it could be sure of complete protection was by bringing its equitable action and making the administratrix a party thereto."

There was considerable of a complication in that case. The assignees of the policy brought the law action first. The company then filed a bill to cancel, but within the contestable period. It also filed an answer to the law suit, but this answer was filed *after* the expiration of the contestable period. The answer included the matters averred in the bill. Thereafter the two cases were consolidated. The lower court *denied* a motion of the company to proceed to a hearing in the equity suit and *sustained* a motion for judgment for the plaintiffs in the law action *because the answer to the law action was filed after the contestable period had expired.* In other words, the lower court held at one and the same time that the bill should be dismissed because the complainant had at the time it was filed an adequate remedy at law, to wit, a right to attack the policy in the law suit, and deprived the company of the defense of fraud in the law action because the answer to the law action was filed too late. The Circuit Court of Appeals reversed and said the proper procedure under the circumstances here was to try the law case before acting upon the equitable action but in a trial of the law case the equitable defense should have been first disposed of. Under the special and extraordinary circumstances of that case we do not question the correctness of the action of the Circuit Court of Appeals in not following the lower court, *which denied the insured a chance to present its defense of fraud in either action.*

In Peake vs. National Life Insurance Co., 15 F. (2d) 303 (C. C. A. 8th Cir.), the court sustained a bill to cancel which was filed *before* a law suit, but made it clear that it would have dismissed the bill, if *the law suit* had been, as in the case at bar, filed first. The court said:

> "Appellants contend that (1) Mrs. Peake's claim is a legal demand and appellee could make its defense of fraud and deceit to that action as a legal defense, and thus had a remedy at law, Insurance Co. v. Bailey, 13 Wall, 616, 20 L. Ed. 501; (2) the insurer's claimed equitable right and remedy are fully set up in an answer to Mrs. Peake's action, filed within the two years' time named in the incontestable clause of the policy, and those rights can be adjudicated in that action, hence there was no occasion to enjoin the prosecution of that action, U. P. Ry. Co. v. Syas, 246 F. 561, C. C. A. 531; and (3) * * *
>
> *"If Mrs. Peake had brought her action before the equity suit had been instituted, and if it were established that she and the insurer were the only parties interested in the subject, the first two propositions contended for might be conceded as sound."* (Italics ours.) Opinion, pp. 304, 305.

Respondent says in its memorandum (p. 3): "There was no provision in the law when those cases (Phoenix Mutual, *Supra,* Cable, *supra,* Buzzard vs. Houston, 119 U. S. 347, and Hipp vs. Baben, 19 How. 271) were decided for the introduction of equitable defenses in actions at law". Does respondent mean to contend by this that if A brought a suit at law against B to recover the price of a mine which he sold to B, and the latter defended on the ground that he was induced to buy it by false and fraudulent representations made by A, that such defense could not be heard, and that judgment must go for the plaintiff regardless of the

defense? Or does it mean that such an extraordinary situation would have resulted if the suit were brought in a Federal Court prior to the enactment of Section 274(b) of the Judicial Code?

Respondent realized that the burden was upon it to show that it was without adequate remedy at law. The only things it could offer were the alleged difference in the degree of proof required to establish fraud in a court of equity and the statement that the executors of the assured were not parties to the suit, apparently being willing to overlook the facts that by its policy and affidavit of defense it was required to prove *knowledge* of falsity, that the executors were not parties to the controversy to be heard by the chancellor, either, and that respondent had tendered a refund of the premium to *petitioner*.

Respondent's inability to offer any better reasons demonstrates the impropriety of making use of Sec. 274(b) of the Judicial Code to deny to petitioner the constitutional right of trial by jury.

Conclusion.

The use which has been made of Section 274 (b) of the judicial code to deny the right of trial by jury is a perversion of its purpose and it is extremely important that this court shall so declare.

Respectfully submitted,

CHARLES H. SACHS,

LOUIS CAPLAN,
Counsel for Petitioner.

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

NO. [redacted] 47

SARAH ENELOW, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

MEMORANDUM FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

NO. 1065.

SARAH ENELOW, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

MEMORANDUM FOR RESPONDENT

The respondent does not oppose the granting of a writ of certiorari. The decisions below are, however, firmly believed to be correct.

The decisions below in this case are supported by the following precedents: *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235, 241, 242-243; *Phillips-Morefield v. Southern States Life Insurance Co.,* 66 Fed. (2d) 29, 30 (C. C. A. 5); *New York Life Insurance Co. v. Marotta,* 57 Fed. (2d) 1038 (C. C. A. 3); *New York Life Insurance Co. v. Hurt,* 35 Fed. (2d) 92 (C. C. A. 8), 41 Fed. (2d) 392; 51 Fed. (2d) 936 (C. C. A. 10), certiorari denied, 285 U. S. 541; *Peake v. Lincoln National Life Insurance Co.,* 15 Fed. (2d) 303, 305 (C. C. A. 8); *Union Pacific R. Co. v. Syas,* 246 Fed. 561, 566 (C. C. A. 8).

The petition for certiorari indicates that the Fifth Circuit is in conflict with the Third Circuit. A decision by the Circuit Court of Appeals for the Fifth Circuit on all fours with the case at bar is in accord with the decisions below: *Phillips-Morefield v. Southern States Life Insurance Co.,* 66 Fed. (2d) 29, 30.

The petitioner has not been deprived unlawfully of a jury trial. In the words of Judge Foster in *Phillips-Morefield v. Southern States Life Insurance Co., supra* (p. 30):

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of *N. Y. Life Ins. Co. v. Marshall,* 23 F. (2d) 225, decided by this court, and *Phoenix Mutual Life Ins. Co. v. Bailey,* 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915, adding section 274b to the Judicial Code (28 U. S. C. A. §398). In the leading case of *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L.

Ed. 232, it was pointed out by the Supreme Court that the statute brought about a consolidation of law and equity in one action in the federal courts, similar to the practice under various state codes, without at all changing the principles applicable to an action at law or in equity. And it was held that the equitable issues raised should be first disposed of as in a court of equity, and then, if an issue at law remained, it was triable to a jury; therefore the right of trial by jury guaranteed by the Seventh Amendment was not infringed."

Phoenix Mutual Life Insurance Co. v. Bailey, 13 Wall. 616; *Cable v. United States Life Insurance Co.,* 191 U. S. 288; *Buzard v. Houston,* 119 U. S. 347; and *Hipp v. Babin,* 19 How. 271, cited by the petitioner, were all decided before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. None of those cases has anything to do with the manner in which an equitable issue introduced into an action at law under Section 274(b) of the Judicial Code should be disposed of. Those were all cases involving separate suits in equity. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, also involved a separate suit in equity. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law, that is beside the question here presented, which is how an equitable defense specifically authorized by a new provision added to the Judicial Code should be adjudicated. The answer to the question presented is contained in the cases first cited in this memorandum.

The defense that the contract sued upon was induced by fraud is an equitable defense. The group of

cases first cited in this memorandum is authority for that conclusion. To those might be added *Fay v. Hill,* 249 Fed. 415, 418 (C. C. A. 8). Fraud is one of the best recognized branches of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; *1 Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

In *Susquehanna S. S. Co. v. Andersen & Co.,* 239 N. Y. 285, cited by the petitioner, the defense that the written instrument sued upon failed by a mistake to express the real intention of the parties was held to constitute an equitable defense. In *Ford v. Huff,* 296 Fed. 652, *laches* was held to be an equitable defense. There is nothing inconsistent with the decisions below in the other case cited by the petitioner in this connection: *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23.

There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief. *2 Pomeroy's Equity Jurisprudence* (4 Ed.) § 885; *Smith v. Richards,* 13 Pet. 26, 36; *Turner v. Ward,* 154 U. S. 618; *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2); *Taylor v. Burr Printing Co.,* 26 Fed. (2d) 331, 334 (C. C. A. 2); *New York Life Insurance Co. v. Marotta,* 57 Fed. (2d) 1038 (C. C. A. 3); *Halsey v. Minnesota-South Carolina L. & T. Co.,* 28 Fed. (2d) 720, 723 (C. C. A. 4); *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6);

Herschberger v. Woodrow-Parker Co., 275 Fed. 908, 916 (C. C. A. 6); *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7); *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8). Sooner or later, therefore, the respondent would have the right to have its defense of fraud adjudicated according to the equitable rule for determining whether a contract has been procured by fraud. Efficiency, economy and enlightened practice, as well as all other sound considerations, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank et al., supra,* 260 U. S. 235, 242. The inadequacy of the remedy at law need not be specifically averred in the defendant's pleadings, inasmuch as it follows from the application of the relevant legal principles to the facts of the case and is therefore a conclusion which the courts perceive.

The petitioner is not the only person having an interest in the policy sued on, as stated in her brief. If the policy of insurance, which is the subject of the litigation, was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate, and not to the beneficiary, the petitioner. The executors of Max Enelow's estate are Anna Katz and Myer Enelow. These persons are not parties to the present suit. That the petitioner is not the only person with an interest in the subject matter of this litigation follows as a matter of law and therefore that legal conclusion need not be pleaded.

The remedy at law must be in all respects equal to that in equity in order to oust the latter of jurisdiction: *Boyce v. Grundy,* 3 Pet. 210, 215. Here, for the reasons shown above, it is not so.

That the constitutional guaranty of trial by jury does not apply to equity procedure is well established: *Parsons v. Bedford et al.,* 3 Pet. 433, 446; *Barton v. Barbour,* 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

The case of *Banker v. Ford Motor Co.,* referred to in the opinion of the Circuit Court of Appeals (R. 49), has now been reported in 69 Fed. (2d) 665.

For the reasons outlined above, the decisions below in this case are correct.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 47

SARAH ENELOW, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent

BRIEF FOR RESPONDENT

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

NO. 47

SARAH ENELOW, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY, Respondent

BRIEF FOR RESPONDENT

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 728. The opinion of the District Court has not been reported, but is contained in the Record at pages 39 and 40.

STATEMENT OF THE CASE

Supplementing the petitioner's statement of the case, the defense is that in the written application for the policy of insurance in litigation, the decedent, Max Enelow, falsely answered in the categorical negative questions inquiring whether he had ever been under observation or treatment in any hospital, whether he

had ever consulted a physician for or had suffered from any ailment of the nervous system, heart or blood vessels, whether he had ever consulted a physician for any ailment not included in his previous answers (of whom there were none) and what physicians, if any, he had consulted or been examined or treated by within the preceding five years (R. 28-29). In fact these answers were false (R. 29). These answers were made by Max Enelow on December 18, 1931 (R. 28). In December, 1928, Max Enelow was in the Mercy Hospital in Pittsburgh for observation, treatment and tests (R. 29-30). From July 6 until July 25, 1930, he was in the Montefiore Hospital in Pittsburgh for observation (R. 30). In September, November and December, 1928, the deceased consulted and was examined by one doctor and went immediately from him to another doctor (R. 30). In February, 1930, he went back to the first doctor (R. 30). During July, August and September, 1930, Max Enelow consulted and was examined and treated by a third doctor (R. 30). At various times during the year 1931 Max Enelow consulted and was examined and treated by still another doctor (R. 30). These examinations, consultations and treatments were all for neurosis, an ailment of the nervous system, and cardiac disease, an ailment of the heart and blood vessels (R. 30). The deceased was suffering from both of those ailments at the time of all of said hospitalization and medical attention (R. 30). These two diseases were also the cause of his death (R. 30).

The respondent believed Max Enelow's answers to the questions in the application to be true and correct and relied upon them in issuing the policy (R. 30-31). If the questions had been answered truthfully and correctly, the policy would not have been issued (R. 30).

The alleged copy of the application caused to be attached to the Record (R. 33) by the petitioner is positively a misrepresentation and unfair. The letters and figures on the photostatic copy of the application attached to the original policy are clear, distinct, sharp in outline and not blurred in the least. The copies which the petitioner has caused to be attached to the Record are blurred, indistinct and certainly not a fair reproduction of the photostatic copy attached to the original policy.

ARGUMENT

Summary

The procedure below is supported by precedent.

There is no adequate remedy at law.

Section 274(b) of the Judicial Code is constitutional.

I

The Procedure Below Is Supported by Precedent

The only decisions involving the question whether under the provisions of Section 274(b) of the Judicial Code the defense of fraud to an action upon an insurance policy may be disposed of according to equitable principles and practice before a judge sitting as a chancellor without a jury are in accord with the decisions of the District Court and the Circuit Court of Appeals in the case at bar. There is not a single case cited by the petitioner, or which we have discovered, involving the above stated question, which was decided in favor of the petitioner's contention.

A case in which exactly the same procedure was followed, as in the instant case, and held to be correct

is *Phillips-Morefield v. Southern States Life Insurance Co.,* 66 F. (2d) 29. That also was an action at law begun in a State court by the beneficiary to collect a life insurance policy. The defendant removed the case to the Federal Court. The defense was that the insured had untruthfully answered in the negative questions regarding his previous treatment by physicians and use of alcohol. The District Court heard the witnesses before a judge alone, without a jury, and decreed cancellation of the policy. The Circuit Court of Appeals for the Fifth Circuit affirmed. Rejecting the appellant's contention that she had been unlawfully deprived of a jury trial, Judge Foster said (p. 30):

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of *N. Y. Life Ins. Co. v. Marshall,* 23 F. (2d) 225, decided by this court, and *Phoenix Mutual Life Ins. Co. v. Bailey,* 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915,

adding section 274b to the Judicial Code (28 U. S. C. A. §398). In the leading case of *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232, it was pointed out by the Supreme Court that the statute brought about a consolidation of law and equity in one action in the federal courts, similar to the practice under various state codes, without at all changing the principles applicable to an action at law or in equity. And it was held that the equitable issues raised should be first disposed of as in a court of equity, and then, if an issue at law remained, it was triable to a jury; therefore the right of trial by jury guaranteed by the Seventh Amendment was not infringed."

It is submitted that the preceding case is indistinguishable from the case at bar, that the reasoning of the Court is sound, and that the decision should be followed here. It may be noted that the case of *Phoenix Mutual Life Insurance Co. v. Bailey,* 13 Wall. 616, principally relied upon by the appellant in the case at bar, was expressly distinguished by the Circuit Court of Appeals for the Fifth Circuit in the foregoing case. That distinction is that the *Bailey* case, as well as *Cable v. United States Life Insurance Co.,* 191 U. S. 288, was decided long before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law, that is a different question from the one here presented, which is how an equitable defense specifically authorized by a new provision added to the Judicial Code shall be disposed of.

The situation is now different from what it was when the *Bailey* and *Cable* cases were decided in that in the meantime Congress has added Section 274(b) to the Judicial Code, thereby providing the salutary improvement of introducing equitable issues into actions at law. Equitable issues when so introduced should be heard and decided according to equitable principles and practice. The equitable principle for determining whether such fraud exists as will vitiate a contract differs from the rule at law for actionable fraud in that knowledge of the incorrectness of his statements by the declarant is not necessary in equity in order to have the contract induced by such erroneous declarations cancelled and rescinded. Equitable procedure differs from that at law in that trial by jury is not required. Authority for these assertions will be set forth hereinafter.

It may also be noted that the *Bailey* and *Cable* cases involved insurance policies which contained no incontestable clauses.

Another case supporting the decisions below is *New York Life Insurance Co. v. Marotta,* 57 F. (2d) 1038. That also was an action at law by the beneficiaries in two policies of life insurance to recover the face amount of said policies. The action originated in the New Jersey State Courts, but was removed to the Federal Courts. The pleadings there were in substance the same as in the case at bar. The defense, as here, was that the policies had been procured by fraud in that the insured had falsely answered material questions in the applications regarding his prior state of health. The District Court submitted the case to the jury, which returned a verdict for the plaintiffs. The District Court also refused the defendant's application to have its

equitable defense of fraud passed upon by a chancellor alone according to equity procedure. The Circuit Court of Appeals for the Third Circuit reversed the order dismissing the equitable defense, on the ground that the defense of fraud in the procurement of the insurance was an equitable one which should have been passed upon by a judge sitting as a chancellor and applying a different rule than that applicable at law to the question whether the policies had been procured by fraud. The Circuit Court of Appeals in that case consisted of Judges Buffington, Woolley and Thomson. The opinion, after summarizing the averments of the pleadings, which summarization would be equally applicable to the pleadings in the case at bar, continues (pp. 1038-1039):

> "It will thus be seen that the defense was both legal and equitable, and upon these two defenses it had a right to be heard. No application was made prior to the trial to transfer the equitable defenses to the equitable side of the court. The court, at the time the order adding the executors as parties to the equitable defenses was entered, had stated to defendant's counsel that defendant's remedy at law was adequate, and that the case would have to be tried as an action at law, at least in the first instance. The allegations of fraud set up in its answer to the plaintiff's complaint were identical with the allegations of fraud set up in the equitable defenses. There is a clearly marked difference in the elements of proof necessary to support fraud as a defense to an action at law, and fraud as a ground for the equitable relief of rescission and cancellation. This distinction the court did not appear to recognize. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law

must necessarily impute such knowledge to the party, at the time when he makes it; but the courts have clearly and repeatedly recognized that there may be actual fraud in equity, without any feature of moral culpability.

The person making an untrue statement without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. Of course, whatever would be fraudulent at law is fraudulent in equity; but the equitable doctrine goes further, and includes instances of fraudulent misrepresentation which do not exist at law. At law there must be a showing, not only of the falsity of the allegation, but also knowledge by the applicant of such falsity. As a general rule, courts of equity may grant relief by way of rescission, abatement, or otherwise, although no fraudulent intent on the part of the person making the representation is shown, and even though he may be honestly misled as a result of misapprehension or mistake. All that need be shown in such case is that the representations were false, and actually misled the person to whom they were made. A very large number of cases sustaining these distinctions are set forth in the appellant's brief, and need not be cited here. These authorities sustain the distinction which exists between fraud at law and fraud in equity so clearly as to remove the question beyond the domain of controversy. While it pretty clearly appears from the record that a number of the material questions answered by the applicant were untrue, under all the circumstances, there being a conflict of evidence, we think the court was right in submitting the question to the jury as to the existence or nonexistence of legal fraud; partic-

ularly as to whether or not the applicant was suffering from, and had been treated for, gout, and, if so, whether he had knowledge of the fact that he was treated for that disease. But that is only a portion of the case. Either prior to the submission of the case to the jury, or afterwards, under the pleadings, it was the duty of the court to find the facts upon which the equitable defenses were based, and, if the findings showed that the applicant's answers were untrue and material, it was the duty of the court to apply to those facts the equitable principle that such false representations were fraudulent, and entitled the defendant to a rescission of the policies, even though the applicant believed the answers to be true when he made them.

Apparently, not having the distinction in mind between legal and equitable fraud, the court entered an order dismissing the equitable defenses. The defendant was thus denied the benefit of the equitable defenses which it set up in its answer, and on which it was entitled to be heard."

In the petitioner's brief (p. 11), the force of the *Marotta* decision is sought to be impaired by the statement that the appellees' brief in that case "entirely ignored" the question here presented. Point III in the appellees' brief in the *Marotta* case reads as follows:

> "The Court correctly denied the motion of the defendant, that the Court, sitting as a Court of Equity should make a finding of fact and law and enter a decree against the executors of the estate of Andrea Marotta in accordance with the prayers of its equitable defenses."

That heading is followed by argument. The question under consideration was specifically raised by the record

in the *Marotta* case and was the turning point in the outcome because it was solely upon the question of hearing the equitable defense that the Circuit Court of Appeals reversed.

It thus appears that Judges Bryan, Foster, Hutcheson, Akerman, Buffington, Woolley, Thomson, Davis, Dickinson, Fake and McVicar, a total of eleven judges, have unanimously agreed that the procedure followed in this case is correct. The first four judges named decided the *Phillips-Morefield* case, the next three the *Marotta* case and the last four the instant case. Were all these judges wrong?

While not involving life insurance, the opinion of this Court in *Liberty Oil Co. v. Condon National Bank, et al.*, 260 U. S. 235, is very enlightening on the practice inaugurated by Section 274(b) of the Judicial Code. Holding that an equitable defense introduced under that section should be tried by the judge alone as a chancellor in advance of the jury trial, this Court, by the late Chief Justice Taft, there said (pp. 242-243):

> "Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable to a jury. (Citing cases) The equitable defense makes the issue equitable and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts.
>
> * * * * * * *
>
> Congress, we think, was looking toward such a union of law and equity actions in the enactment of §274b, quoted above, and of §274a, * * *"

In the same case this Court also said (p. 241):

"This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, with all the consequences flowing therefrom. The better practice would perhaps have been, on the defendant's filing its answer and cross petition, to order the cause transferred to the equity side of the court."

This Court then went on to say that, although there is no specific provision by rule or statute requiring actions at law to be transferred to the equity side of the court where the cause really is or becomes equitable, still that the Federal courts not only have the power to, but should do so. To that effect, this Court said (p. 241):

"* * * we think the power of the trial court to order a transfer in a case like this is implied from the broad language of §274b, above quoted, by which the defendant who files an equitable defense is to be given the same rights as if he had set them up in a bill in equity, and from §274a of the Judicial Code, quoted below, in which the court is directed, when a suit at law should have been brought in equity, to order amendments to the pleadings necessary to conform them to the proper practice."

It may be noted that this Court characterized the language of Section 274(b) as "broad".

Other cases involving life insurance alleged to have been procured by materially false answers in the application in which it has been held that such a defense introduced into an action at law under Section

274(b) of the Judicial Code should be first heard and decided by a chancellor alone without a jury according to equitable principles and practice include *Peake v. Lincoln National Life Insurance Co.*, 15 F. (2d) 303; *New York Life Insurance Co. v. Hurt*, 35 F. (2d) 92, 41 F. (2d) 392, 51 F. (2d) 936; and *New York Life Insurance Co. v. Halpern*, 47 F. (2d) 935. In the *Peake* case, a bill in equity had been filed by the insurer to cancel a policy because of fraud by the insured in his answers to questions in the application. The next day after the filing of this bill the beneficiary brought an action at law in a State court upon the policy. The District Court entertained jurisdiction and granted an injunction against a further prosecution of the action at law. The Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that no possible injury could occur to the beneficiary because of sustaining the equitable jurisdiction, because the defense of fraud was an equitable one and would be heard by a chancellor without a jury, even if that defense were interposed to an action at law. Upon this point Judge Lewis said (p. 305):

> "No possible injury or detriment can come to Mrs. Peake by staying her action until the equity suit is first disposed of, which will be tried without a jury, as the equitable defense to her law action also would be tried without a jury. *U. P. R. Co. v. Syas, supra; Liberty Oil Co. v. Condon Bank*, 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232. She is being denied no right by the order complained of."

In *New York Life Insurance Co. v. Halpern, supra*, Judge Gibson of the District Court for the Western District of Pennsylvania, in holding that equity had jurisdiction of a bill to rescind a life insurance policy under the circumstances of that case, said (p. 938):

> "And even if all testimony were still available, if the directions of the Circuit Court of Appeals in the *Hurt* case, *supra,* should be followed in respect to the manner of trial, the defensive matter set forth in plaintiff's bill would be heard by the judge as a chancellor, and passed upon by him prior to submission of the case to the jury."

The *Hurt* case (35 F. (2d) 92), referred to by Judge Gibson in the preceding quotation, is in accord with the *Phillips-Morefield* case, *supra.* The directions of the Circuit Court of Appeals for the Eighth Circuit, referred to by Judge Gibson, were followed by Judge Pollock of the District Court for the District of Kansas, Second Division, when the *Hurt* case was remanded back to him: 41 F. (2d) 392. After a hearing before Judge Pollock, sitting without a jury, he entered a decree cancelling the policy there involved on the ground that it had been procured through fraudulent concealment by the insured of his physical condition and consultations with physicians, as well as of breach of a condition precedent by reason of the insured having consulted a physician between the date of his medical examination for the policy and the date of the delivery of the policy to him. This decree was affirmed upon a second appeal to the Circuit Court of Appeals (51 F. (2d) 829).

The petitioner attempts to distinguish the *Hurt* case on the ground that someone else besides the plaintiff in the lawsuit had an interest in the policy. That other party was the administratrix of the insured's estate. The executors of Max Enelow's estate, however, have also an interest in the policy now in litigation, because the premiums which Max Enelow paid would be strictly returnable to his estate, and not to the beneficiary designated for the death benefit.

That the defense of fraud in the procurement of a contract upon which suit is brought is an equitable defense follows from the cases heretofore cited. That the defense of fraud is an equitable one was also expressly so stated in *Union Pacific R. Co. v. Syas,* 246 Fed. 561. That was an action at law for personal injuries brought by Syas against the Railroad Company in which one of the defenses was a settlement with and release from plaintiff. Plaintiff contended that this release had been procured by fraud. After the pleadings were closed the defendant petitioned the court that all issues regarding the release should be heard and determined upon the equity side of the court prior to the trial of the other issues raised by the pleadings. This petition was refused and upon a similar request being made at the opening of the trial a like ruling followed. The case was then brought before a court and jury upon all the issues raised by the pleadings, both as to defendant's negligence and the validity of the release. The District Court said that it was simply submitting the issue as to the validity of the release to the jury in an advisory capacity. The jury found for the plaintiff upon all issues and the court subsequently entered judgment in accordance with the verdict. The Circuit Court of Appeals for the Eighth Circuit reversed on the ground that the validity of the release should have been heard by a judge alone as an equitable suit in advance of the jury trial and that even though a chancellor may submit an issue of fact to a jury for an advisory decision, still that the same jury should not be used for that purpose and also to decide the issues at law, at least in such case as this where the jury is apt to be prejudiced against the defendant.

Holding that the equitable issue should be tried

first by a judge alone, the court by Judge Carland said (p. 566):

> "We are clearly of the opinion that, when equitable relief is asked in an action at law under the statute above quoted [§274(b)], the case for equitable relief should be tried as a case in equity, and that the great weight of authority is in favor of the practice of trying the case in equity first, for this practice serves to keep the equitable matter distinct, and to prevent what must otherwise frequently ensue—confusion and embarrassment in the progress of the action."

The court held that the proceeding to rescind the release was essentially an equitable one, saying (p. 567):

> "The proceeding to rescind the release in this case, whether by original bill or as permitted by the statute, was essentially an equitable proceeding."

Another case holding that fraud in the procurement of a contract gives rise to an equitable defense is *Fay v. Hill,* 249 Fed. 415 (C. C. A. 8). The court in that case said (p. 418):

> "But, aside from this, if there had been a transfer to the law side of the court, and the bill treated as an answer to the action at law, if it stated an equitable defense, it would have had to be disposed of by the court, sitting as a chancellor, before the trial of the action at law to a jury; and if upon such a hearing the equitable defense had been sustained there would be nothing left to try to a jury. This was decided by this court in *Union Pacific R. R. v. Syas,* 246 Fed. 561,—C. C. A.—The facts alleged in the complaint make it clearly a case for equitable relief, as it seeks to cancel contracts al-

leged to have been obtained by fraud and deception, and that the minds of the parties had never met. *Sharon v. Hill* (C. C.), 20 Fed. 1; *Sharon v. Hill* (C. C.), 22 Fed. 28. The cancellation of the contracts would prevent their use in any other action instituted by appellant on these contracts."

Fraud is one of the best recognized branches of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; *1 Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

Buzard v. Houston, 119 U. S. 347, and *Hipp v. Babin,* 19 How. 271, cited by the petitioner, were decided before Section 274(b) was added to the Judicial Code. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, involved a separate suit in equity. In *Susquehanna S. S. Co. v. Andersen & Co.,* 239 N. Y. 285, also cited by the petitioner, the defense that the written instrument sued upon failed by a mistake to express the real intention of the parties was held to constitute an equitable defense. In *Ford v. Huff,* 296 Fed. 652, *laches* was held to be an equitable defense. There is nothing inconsistent with the decisions below in the other case cited by the petitioner in this connection: *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23.

American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., 62 F. (2d) 1018, cited by the petitioner, did not involve rescission of a written contract which had been procured by fraud, but only other questions fully cognizable at law, as shown by the two jury trials through which the case had already gone. There was no difference between the applicable principles at law and in equity in that case. Furthermore, all of the par-

ties who could possibly have any interest in the subject matter were joined in that case, which is not so in the instant case.

The only precedents in point are therefore all in accord with the decision of the District Court and the Circuit Court of Appeals in the case at bar. It is respectfully submitted that those precedents are correct and should be followed.

II

There Is No Adequate Remedy at Law

One reason why there is no adequate remedy at law is that a written contract will be rescinded and ordered surrendered by equity if the complaining party was induced to enter into it by materially false representations of fact by the other party, though the latter did not know that his representations were false when he made them. At law actionable fraud requires, in addition to the falsity and materiality of the representations, proof that the assertions were made with knowledge of their falsity. In equity, on the contrary, it is not necessary for the complaining party to prove that the other party knew that his statements were false when he made them. Equity will grant relief by way of rescission of a written contract upon proof only that one of the parties asserted what was not correct in fact and that the other party would not have entered into the contract but for those erroneous statements. *1 Black on Rescission and Cancellation* (2 Ed.), § 102. *1 Story's Equity Jurisprudence* (14 Ed.), § 272. *2 Pomeroy's Equity Jurisprudence* (4 Ed.), § 885. *12 R. C. L.* 345. *26 Corpus Juris* 1181-1182. *Smith v. Richards,* 13

Pet. 26, 36. *Turner v. Ward,* 154 U. S. 618. *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2). *In re New York Commercial Co.,* 228 Fed. 120, 121 (C. C. A. 2). *Taylor v. Burr Printing Co.,* 26 F. (2d) 331, 334 (C. C. A. 2). *New York Life Insurance Co. v. Marotta, supra. Kell v. Trenchard,* 142 Fed. 16, 23 (C. C. A. 4). *Manly v. Ohio Shoe Co.,* 25 F. (2d) 384, 385 (C. C. A. 4). *Halsey v. Minnesota-South Carolina L & T. Co.,* 28 F. (2d) 720, 723 (C. C. A. 4). *Donnell v. C. R. Disharoon Co.,* 32 F. (2d) 151, 153 (C. C. A. 4). *General Finance Corp v. Keystone Credit Corp.,* 50 F. (2d) 872, 878 (C. C. A. 4); certiorari denied, 284 U. S. 684. *Hindman v. First National Bank,* 112 Fed. 931, 944 (C. C. A. 6); certiorari denied, 186 U. S. 483. *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6). *Herschberger v. Woodrow-Parker Co.,* 275 Fed. 908, 916 (C. C. A. 6). *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7). *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8).

In the first of the authorities just cited, it is said (p. 300):

> "An action at law for fraud in making false representations and a suit in equity for the rescission of a contract on the ground of misrepresentations are founded on distinct theories. The former is based on an intentional deceit, which of course includes a knowledge of the falsity of what is affirmed. But the latter is aimed at the undoing of a bargain which circumstances would render it inequitable to enforce and the restoration of the parties to the *status quo,* and this may be consistent even with entire innocence and ignorance on the part of the person making the misrepresentations, or with his belief in their truth."

In the same work it is also said (p. 301):

"Hence we have the well-settled rule in equity that when rescission of a contract, deed, or other transaction is sought on the ground of misrepresentations of material matters of fact, believed in and acted upon by the party seeking relief, and resulting in his injury or prejudice, it is not necessary to show that the party making the representations knew them to be false, but he will be held responsible for their falsity, though he spoke without knowing anything about the matter, though he himself was misinformed and mistaken, and even though he actually believed in the truth of what he affirmed."

In *12 R. C. L.* 345, the following is found, for which are cited a host of cases from a great many different States:

"Rule in Equity—False representations which are made with knowledge of their falsity, and with a fraudulent intent, are, of course, ground for relief in equity as well as at law. As a general rule, however, courts of equity will grant relief in such cases, by way of rescission or otherwise, even though no fraudulent intent on the part of the person making the representation is shown, and though he made them innocently, as a result of misapprehension or mistake. All that need be shown under such circumstances is that the representations were false and actually misled the person to whom they were made."

In the petitioner's brief (p. 14), there is a quotation from *Smith v. Richards, supra,* but the excerpt stops just short of what is pertinent to the case at bar. The next two sentences of this Court's opinion in that case are as follows (pp. 36-37):

> "And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in *Nevill v. Wilkinson,* 'it misleads the parties contracting, on the subject of the contract.' "

Surely it operates as a surprise and imposition upon and misleads a mutual life insurance company if it is informed that an applicant has never been under observation or treatment in any hospital, that he has never consulted a physician for or suffered from any ailment of the nervous system, heart or blood vessels and that he has consulted no physician whatever within the preceding five years and then, after it has issued a policy to that applicant as a first-class risk, he dies within less than two years of heart disease and a nervous affliction from which he had been suffering, for which he had consulted several physicians and on account of which he had been in more than one hospital over a period of some three years immediately prior to applying for the insurance.

In *Halsey v. Minnesota-South Carolina L. & T. Co., supra,* Judge Parker, for the Court, said (p. 723):

> "A different rule prevails in equity from that which obtains at law as to the necessity for showing a knowledge of falsity or fraudulent intent in the case of false representations. And as a general rule courts of equity will in proper cases grant relief, by way of rescission, abatement, or otherwise, even though no fraudulent intent on the part of the person making the representation is shown, and though he made it honestly, as a result of misapprehension or mistake. All that need be shown in such cases

is that the representations were false and actually misled the person to whom they were made."

In *General Finance Corp. v. Keystone Credit Corp., supra,* to which this Court refused a certiorari, the Circuit Court of Appeals said (p. 878):

"Furthermore, it is well settled that a false representation of a material fact constituting an inducement to a contract, on which the opposite party has a right to rely, is ground for rescission in equity, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being, not whether the party making the representation knew it to be false, but whether the opposite party believed it to be true, and was misled by it in entering into the contract."

In *Hindman v. First National Bank, supra,* to which case also this Court refused a certiorari, the Circuit Court of Appeals for the Sixth Circuit, by Judge (afterwards Mr. Justice) Lurton said (p. 944):

"Before the plaintiff can recover in an action of deceit, he must prove two things: that the representation was false, and that the person making it knew it was false. *Glasier v. Rolls,* 42 Ch. Div. 436; *Derry v. Peek,* 14 App. Cas. 337; *Kountze v. Kennedy,* 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Cook, Corp.* § 355; *Trimble v. Reid,* 97 Ky. 713, 31 S. W. 861. Such an action differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit, it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand."

There is also a very large number of decisions in accord by the State courts. They include *King v. Livingston Mfg. Co.,* 192 Ala. 269, 272; *Johnson v. Withers,* 9 Cal. A. 52, 55; *Colorado Springs Co. v. Wight,* 44 Colo. 179, 182; *Frenzel v. Miller,* 37 Ind. 1, 18; *Trimble v. Reid,* 97 Ky. 713, 718; *Hammatt v. Emerson,* 27 Me. 308, 332; *Cahill v. Applegarth,* 98 Md. 493, 503-4; *Rimer v. Dugan,* 39 Miss. 477, 483; *Peters v. Lohman,* 171 Mo. A. 465, 483; *Eibel v. Von Fell,* 55 N. J. Eq. 670, 671; *Sarson v. Maccia,* 90 N. J. Eq. 433, 435; *Kountze v. Kennedy,* 147 N. Y. 124, 129; *Squiers v. Thompson,* 76 N. Y. S. 734, 736, 73 App. Div. 552, affirmed in 172 N. Y. 652; *McCall v. Davis,* 56 Pa. 431, 435; *Shwab v. Walters,* 147 Tenn. 638, 643; *Buchanan v. Burnett,* 102 Tex. 492, 495; *Collins v. Chipman,* 41 Tex. Civ. A. 563, 577; *Wilson v. Carpenter,* 91 Va. 183, 187, 189-190; *Tolley v. Poteet,* 62 W. Va. 231, 251; and *Smith v. Mariner,* 5 Wis. 551, 577.

Southern Development Co. v. Silva, 125 U. S. 247, cited by the petitioner, does not decide differently. The plaintiff in that case failed for want of proof that the defendant had made any false statement or that the plaintiff had relied upon what the defendant said.

Sooner or later the respondent, it is respectfully submitted, should have the right to have its defense of fraud adjudicated according to the equitable rule enunciated in the foregoing authorities for determining whether the policy was procured by fraud. Efficiency, economy, enlightened practice and all other sound considerations, we submit, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

The petitioner seeks to escape from the inadequacy of the legal remedy shown by the group of authorities

last cited because the respondent in its affidavit of defense pleads that Max Enelow made the answers in the application with knowledge of their falsity and fraudulently for the purpose of procuring the insurance. The petitioner overlooks the fact that the affidavit of defense had to cover the respondent's defense at law, as well as in equity. As stated by the Court in *New York Life Insurance Co. v. Marotta, supra,* the defense was both legal and equitable. At law the group of cases last cited show that knowledge of the falsity of his statements by the party making them must be pleaded and proved. It was therefore necessary to allege in the affidavit of defense that Max Enelow knew that his answers were false. The respondent was justified in making those allegations because it believes them to be true. Whether Max Enelow knew the nature of his afflictions or not, he certainly knew that he had been in two hospitals and had consulted and been examined or treated by several physicians during the three years immediately before applying for the insurance in controversy. The respondent might not, however, be able to prove such guilty knowledge, and, even if it did so, a sympathetic and prejudiced jury would probably nevertheless find against it. It is for that reason that a hearing according to equitable principles and practice is desired. Simply because the affidavit of defense also pleads what is necessary to constitute a defense at law, it does not follow, as the petitioner simply assumes, that those allegations of the affidavit of defense must also be proved in the hearing according to equitable principles and practice.

Also for the purpose of showing that there is an adequate remedy at law, the petitioner refers to the provision of the policy to the effect that all statements made by the insured shall, in the absence of fraud, be

deemed representations and not warranties. That provision, it is submitted, is irrelevant to the issue. Even if the insured's statements be but representations, if they relate to material matters, are false in point of fact, and were an inducement but for which the respondent would not have issued the policy, all of the requisites for relief in equity are present.

It was not necessary for the respondent to plead that it is without an adequate remedy at law or that it is in need of equitable relief. The inadequacy of the remedy at law and the need for equitable relief follow as conclusions of law from the application of the relevant legal principles to the facts of the case and are thus perceived by the Court for itself.

From what has already been said, it also follows that the defense that the applicant's answers to material questions were false and that the respondent was misled by those incorrect declarations, though the applicant may not have known of the falsity of his answers when he made them, could not be pleaded at law in bar. At law the mere falsity and materiality of the representations would not constitute a sufficient basis for relief. Knowledge by the applicant of the falsity of his answers when he made them would be a requisite additional element. The defense, in so far as it is based simply upon the falsity and materiality of the deceased's answers to the questions in the application, is therefore an equitable defense within the petitioner's own definition.

The illustration involving the jeweler put in the petitioner's brief (p. 15) is not apropos because a representation by such a vendor that a watch case was solid gold, 18 carat fine, would clearly constitute a war-

ranty in the law of sales. The Uniform Sales Act, which was adopted in Pennsylvania in 1915, P. L. 543, and has been adopted by most of the other states also, provides in § 12 that "Any affirmation of fact * * * by the seller relating to the goods is an express warranty if the natural tendency of such affirmation * * * is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

Lastly, in connection with the distinction between the rules at law and in equity for determining whether such fraud exists as will vitiate a contract, the petitioner refers to the proposition that mere expressions of opinion or representations qualified by a statement that they are simply to the best of the knowledge of the party making them, do not constitute any ground for complaint either at law or in equity. There is no question about the correctness of that proposition in the abstract, but it does not apply to the facts of the case at bar. While a question to an applicant for insurance inquiring whether he has a specified disease, as the petitioner supposes in her brief (p. 16), may simply call for an honest expression of opinion, the defense to the petitioner's claim in the instant case is based in part upon questions about the answers to which there could be no difference of opinion. The questions relied upon for the defense include ones which inquire only for simple facts within the knowledge of the applicant. Thus, one of the questions involved in the case at bar is whether the applicant has ever been under observation in any hospital (R. 28). Another asks what physicians, if any, the applicant has consulted or been examined or treated by within the past five years (R. 29). Max Enelow had been in two hospitals for observation and had consulted at least four doctors within

approximately three years of his application for the insurance in dispute (R. 29-30). These were simple facts within his knowledge, admitting of no difference of opinion: *New York Life Insurance Co. v. McCarthy,* 22 F. (2d) 241, 244. It does not help the petitioner therefore to advert to the propriety of expressions of opinion.

Another reason why the remedy at law is not adequate in this case is because the petitioner is not the only person having an interest in the policy sued on. If the policy was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate, and not to the beneficiary, the petitioner. The petitioner is not the personal representative of her husband's estate. Two other persons, not now parties to the present suit, are the executors of Max Enelow's estate. The petitioner's brief (p. 17) impliedly admits the correctness of these statements of fact.

That the petitioner is not the only person with an interest in the subject matter of this litigation follows as a matter of law and therefore that legal conclusion need not be pleaded.

The petitioner seeks to escape the effect of the fact that necessary persons are not parties to the case by arguing that the executors "are not parties to the controversy that would be heard by the chancellor any more than they are to the lawsuit" (p. 18). The petitioner ignores Equity Rule No. 37 promulgated by this Court which provides in part as follows:

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

The appeal in this case was made to operate as a supersedeas (R. 43). It is the respondent's intention promptly to apply for the joinder of the executors of Max Enelow's estate as parties if this Court affirms the decree below.

The petitioner attempts to dwarf the amount of the premiums, which are offered to be returned, into insignificance by alluding to them as a "few dollars" (p. 18). In fact they amount to over $500 (R. 31). That the respondent before the institution of suit tendered a refund of the premiums to the petitioner cannot affect the legal rights of the executors of the insured's estate to that money or the liability of the respondent to refund the premiums to those executors regardless of whether or not the respondent had already paid an equivalent sum of money to another who was not entitled thereto.

The petitioner concedes in her brief that even if a suit at law to recover on a policy is first brought within the contestable period, still the insurer is entitled to maintain a bill in equity for rescission on the ground of fraud, if all of the parties having an interest in the policy were not included as plaintiffs in the action at law (p. 20). In the case at bar it is submitted that all of the parties having an interest in the policy are not now included as plaintiffs and if, therefore, as the petitioner concedes, the respondent would have the right to file a separate bill in equity, the respondent should certainly have the right to seek the same relief by way of an equitable defense under Section 274(b) of the Judicial Code.

III

There Is No Abridgment of the Constitutional Right of Trial by Jury

If the foregoing portion of this brief places the proper construction upon Section 274(b) of the Judicial Code, the only question remaining is whether as so construed that statutory enactment is constitutional. That it is constitutional is established by the well settled fundamental doctrine that the constitutional guaranty of trial by jury does not apply to equity procedure: *Parsons v. Bedford et al.,* 3 Pet. 433, 446; *Barton v. Barbour,* 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

That Section 274(b) is constitutional was also decided by this Court in *Liberty Oil Co. v. Condon National Bank, supra.*

In conclusion, it is respectfully submitted that the broad language of Section 274(b) of the Judicial Code should be construed in the interest of improved procedure, fair and impartial trials, and substantial justice, to sustain the procedure followed by the District Court and the Circuit Court of Appeals in the case at bar and by the courts of the Fifth Circuit in *Phillips-Morefield v. Southern States Life Insurance Co., supra.*

That the petitioner will thereby nevertheless receive a fair and impartial trial is evidenced by the case of *New York Life Insurance Co. v. Halpern,* 57 F. (2d) 200, 61 F. (2d) 1037, cited in the petitioner's own brief (p. 19). Nor will she by the affirmance of the decree below be deprived of any constitutional right. Accordingly, the decree appealed from should be affirmed.

Respectfully submitted,

LOUIS H. COOKE,
WILLIAM H. ECKERT,
Counsel for Respondent.

APPENDIX.

Section 274(b) of the Judicial Code (28 U. S. C. A. § 398):

Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

SUPREME COURT OF THE UNITED STATES.

No. 47.—October Term, 1934.

Sarah Enelow, Petitioner, *vs.* New York Life Insurance Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 7, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This is an action at law upon a policy of life insurance issued by respondent in December, 1931, on the life of petitioner's husband, Max Enelow, who died in May, 1933. The action was brought in a state court in Pennsylvania, in July, 1933, and was removed to the federal court. The policy provided that it should be incontestable after two years from date of issue. In its affidavit of defense, respondent set up the affirmative defense that the policy had been obtained by means of false and fraudulent statements in the decedent's application which was made a part of the policy. These statements consisted of the applicant's answers to questions with respect to hospital observation or treatment and to his consultations with physicians. Respondent alleged that, while the applicant had answered these questions with an unqualified negative, he had in fact repeatedly consulted physicians for neurosis and cardiac disease and had twice been the subject of hospital observation. Respondent further alleged that these answers were made by the applicant "with knowledge of their falsity and fraudulently for the purpose of procuring said insurance". Respondent tendered judgment for the premiums received by it, with interest, and prayed for cancellation of the policy. Petitioner in her reply denied that the answers in the application were either false or fraudulent.

Respondent then presented a petition asking that the "equitable issue" raised by the affidavit of defense and the plaintiff's reply

should be heard pursuant to Section 274b of the Judicial Code (28 U. S. C. 398) "by a chancellor according to equity procedure in advance of the trial by jury at law of any purely legal issues". The District Court entered a rule to show cause why the petition should not be granted and, on hearing, made the rule absolute. Its decree was affirmed by the Circuit Court of Appeals. 70 F. (2d) 728. This Court issued writ of certiorari, October 8, 1934.

First. A preliminary question arises as to the jurisdiction of the Circuit Court of Appeals. The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within the purview of Section 129 of the Judicial Code (28 U. S. C. 227) permitting appeal.

This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Section 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between "proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity". Per Van Devanter, J., in *Griesa* v. *Mutual Life Insurance Company,* 165 Fed. 48, 50, 51.

When the Congress enacted Section 274b of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the substance of the authorized intervention of equity was not altered. The court was empowered to exercise a summary equitable jurisdiction. Equitable defenses were permitted to be interposed in actions at law "by answer, plea or replication without the

necessity of filing a bill on the equity side of the court''.[1] The defendant is to have ''the same rights'' as if he had filed a bill seeking the same relief. The equitable issue ''is to be tried to the judge as a chancellor''. The same order of trial is preserved as under the system of separate courts. *Liberty Oil Company* v. *Condon Bank,* 260 U. S. 235, 242, 243. The trial of the issue at law may be postponed until the equitable issue is first disposed of, and then, if an issue at law remains, it is triable by a jury as the Seventh Amendment requires. *Id.*

It is thus apparent that when an order or decree is made under Section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose. Such a decree was made in the instant case, and therefore, although interlocutory, it was appealable to the Circuit Court of Appeals under Section 129. See *Ford* v. *Huff,* 296 Fed. 652, 658; *American Cyanamid Co.* v. *Wilson & Toomer Co.,* 62 F. (2d) 1018, 1019, 1020. Compare *Emlenton Refining Co.* v. *Chambers,* 14 F. (2d) 104.

Second. We come to the merits. Was the defense set up by the defendant of such a nature that defendant was entitled to have it heard and determined in equity and to enjoin the proceedings at law pending that determination? The test under Section 274b is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive

[1]The text of Section 274b (28 U. S. C. 398) is as follows:

''*Equitable defenses and equitable relief in actions at law.* In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require''.

jurisdiction of equity was sought to be changed or enlarged. The defendant's rights to a hearing in equity are "the same", not greater, when he resorts to the summary procedure. See *Liberty Oil Company* v. *Condon Bank, supra; Union Pacific Railroad Co.* v. *Syas,* 246 Fed. 561, 565; *American Cyanamid Co.* v. *Wilson & Toomer Fertilizer Co., supra; New York Life Insurance Co.* v. *Miller,* C. C. A. 8th Circuit, October 25, 1934. Compare *Phillips-Morefield* v. *Southern States Life Insurance Co.,* 66 F. (2d) 29, 30; *New York Life Insurance Co.* v. *Marotta,* 57 F. (2d) 1038. And it necessarily follows that this summary procedure cannot aid the defendant when a bill for the same relief would not lie because the defense is one which is completely available in the action at law. Emphasizing the fundamental principle of the equitable jurisdiction, the Congress, from the first Judiciary Act, has declared that suits in equity shall not be sustained in any court of the United States in any case where a "plain, adequate and complete remedy" may be had at law. Act of September 24, 1789, sec. 16, 1 Stat. 82; Jud. Code, sec. 267, 28 U. S. C. 384.

The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable.[2] Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant "with knowledge of their falsity and fraudulently" in order to obtain the insurance.

[2]See Mutual Life Insurance Co. v. Hurni Packing Co., 263 U. S. 167, 177; Jefferson Standard Life Insurance Co. v. Keeton, 292 Fed. 53, 54; Jefferson Standard Life Insurance Co. v. McIntyre, 294 Fed. 886; Jones v. Reliance Life Insurance Co., 11 F. (2d) 69, 70; Peake v. Lincoln National Life Insurance Co., 15 F. (2d) 303, 305, 306; Keystone Dairy Co. v. New York Life Insurance Co., 19 F. (2d) 68; Rose v. Mutual Life Insurance Co., 19 F. (2d) 280, 282; Brown v. Pacific Mutual Life Insurance Co., 62 F. (2d) 711, 712.

The affidavit of defense showed nothing whatever as a further ground for equitable relief and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. *Insurance Co.* v. *Bailey,* 13 Wall. 616, 623; *Life Insurance Company* v. *Bangs,* 103 U. S. 780, 782; *Cable* v. *United States Life Insurance Co.,* 191 U. S. 288, 305; *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 363; *New York Life Insurance Co.* v. *Marshall,* 23 F. (2d) 225; *New York Life Insurance Co.* v. *Miller, supra.* Respondent was in no better position under Section 274b.

Nor is there merit in the contention that the remedy at law is not adequate because petitioner is not the only person interested in the policy and that the premiums paid would be refundable to the decedent's executors. The executors have no interest entitling them to enforce the policy. Petitioner is the sole beneficiary of the policy and is entitled to recover upon it, if it is valid, and cannot prevail if the defense of fraud is established. *Insurance Co.* v. *Bailey, supra; Cable* v. *United States Life Insurance Co., supra.* The affidavit of defense raised no question as to petitioner's standing as beneficiary of the policy, and, indeed, it expressly offered judgment in favor of the petitioner for the amount of the premiums in accordance with a tender previously made.

Respondent's petition for a hearing and determination in equity in advance of the trial of the action at law should have been denied. The decree of the Circuit Court of Appeals is reversed and the action is remanded to the District Court with direction to vacate its order for a hearing in equity and to proceed with the trial of the action at law.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.